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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN.

VOLUME 118.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1908.

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AMERICAN STATE REPORTS.

VOLUME 112.

(15)

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

**CULVER LUMBER AND MANUFACTURING COMPANY
v. CULVER.**

[81 Ark. 102, 99 S. W. 391.]

CORPORATION.—One Who Owns a Majority of the Shares of the stock in a corporation is entitled to control its business. (p. 26.)

CORPORATION—Grounds for Receivership.—When the officers of a foreign corporation are recklessly and extravagantly managing its affairs, involving it in debt, and converting its property to their own use, and the board of directors, though requested, refuse to interfere, the interposition of a court of equity and the appointment of a receiver are proper. (p. 27.)

CORPORATION—Mismanagement.—Courts of Equity have no authority to dissolve a foreign corporation or wind up its business, but they may, in case of mismanagement in its affairs, take charge of its property within their jurisdiction and enforce the rights of creditors and stockholders in respect thereto. (p. 27.)

CORPORATION—Receivership Proceedings—Nonsuit.—After a receiver for a corporation has been appointed, creditors have intervened, and proved their claims, and the corporate property has been sold, the court will not permit the plaintiff to take a nonsuit, and will deny a motion to discharge the receiver. (p. 27.)

JUDICIAL SALE.—The Approval of a Judicial Sale by the chancellor will not be disturbed on appeal when no abuse of discretion appears. (p. 28.)

W. E. Beloate and F. G. Taylor, for the appellants.

Morris M. Cohn and John W. & Joseph M. Stayton, for the appellees.

104 BATTLE, J. On the 25th of August, 1902, Mary C. Culver instituted this suit against the Culver Lumber and Manufacturing Company in the Lawrence circuit court, on the equity side, which was afterward transferred to the Lawrence chancery court, it having been created after the institution of this suit.

Am. St. Rep., Vol. 118—2 (17)

Plaintiff alleged in her complaint, substantially, as follows: She is a married woman and a resident of the state of Missouri. The defendant is a corporation, organized under the laws of the state of Missouri. Its capital stock amounts to \$300,000, divided into shares of \$100 each, of which she owns and holds as her separate estate seventeen hundred and twenty-five shares, which is much more than one-half of the stock. It has been engaged in the business of sawing and manufacturing lumber and the selling of the same, and at the commencement of this suit was so engaged, with its mills at or near Sedgwick, in Lawrence county, in this state. It established, in 1902, in the state of Arkansas a planing-mill with expensive machinery and facilities for making and furnishing the trade with all kinds of dressed lumber, sash, doors, mill and finishing work; and in the course of its business acquired considerable property, both real and personal, exceeding in value \$500,000, and contracted an indebtedness in about the sum of \$250,000. At a meeting of the board of directors, held in January, 1902, H. A. Culver was selected and appointed general manager of the business of the defendant, Elias W. Culver was elected president, Edgar W. Culver, treasurer, and Joe E. Culver, secretary. In March, 1902, the president, secretary and treasurer, without authority from the board of directors, ¹⁰⁵ purchased real estate, and recklessly, extravagantly and unnecessarily expended about \$5,000 in building offices, and Edgar W. and Joe E. Culver, respectively, secretary and treasurer, have so extravagantly and recklessly conducted the business of the company that it became largely involved, and by such recklessness and extravagance alarmed the large creditors of the company, and caused them to induce the president to make an agreement in writing in and by which J. H. Jarrett and Frank I. Buckingham, of moderate means, were to be placed without bond, in the absolute charge and control of the entire business of the defendant yielding about \$40,000 to \$60,000 a month. Such managers are inexperienced in the management of similar business, and, if allowed to control, will in a short time cause loss to defendant, if it does not render it bankrupt, and will imperil and wreck it financially. They have already taken possession of all the property at Kansas City, Missouri, and Kansas City, Kansas, "and refuse to act or conduct the business of the defendant under the directions or proper orders of its officers and managers, but that, in-

stead, they are arbitrarily refusing to permit its officers, directors and legal managers to have any voice or control in the management of its business, and when its manager has drawn checks to pay for material used in the conduct of its business, they have refused to pay or permit the payment thereof, and are threatening, under and in pursuance of the alleged contract, to take charge of the business and property in the state of Arkansas, and hold and operate the same to the exclusion of the defendant or its board of directors or managing officers." Plaintiff "has requested the board of directors and officers of the defendant to bring suit to set aside said contract and take management of such business again, but they have refused and neglected to do so."

Plaintiff further stated that at the mills of defendant in this state, and elsewhere, "are employed about four hundred persons, and that there is now due to them in small sums, respectively, about \$5,000, and that there is due on pay-days, twice each month, to said hands about \$2,000 or \$3,000 each pay-day, and that, being a foreign corporation, said sundry individual employes can attach the property of defendant to satisfy their claims and costs incident thereto, and that said proceedings would entail a large ¹⁰⁰ amount of costs and would wreck said property; that the employes and creditors are threatening to attach, and such attachment would cause a large amount of defendant's property to be sacrificed and lost, and that, for the protection of all creditors and the rights of the plaintiff and other stockholders, it is necessary that said property in this state be held intact as a manufacturing plant, at least until the product belonging to the defendant can be manufactured and disposed of"; and that if this is done its debts can be paid in a short time.

Plaintiff asked the court, first, to "issue an order restraining and enjoining all of the officers in this state of the defendant, or anyone acting for them in the state of Arkansas, from removing, selling, mortgaging or otherwise disposing of the property, real and personal, in this state, and also restraining them and enjoining all persons from interfering in this state with the business, assets, property or affairs of the defendant; second, that the court appoint a suitable person as receiver to take charge and control of all the property of defendant within the state of Arkansas, with the power to manage, control and operate it, if necessary, under the orders of this court, as may from time to time be

made in the premises; and that the cause be referred to a master in chancery, who shall by appropriate orders be authorized to hear, determine and report to the court all indebtedness due by defendant, and that out of the proceeds arising from the receivership the receiver be directed by appropriate orders from this court to pay the costs and expenses of this receivership, next all debts that may be adjudged and found due to the creditors of the defendant, and that the remainder, if any, to the several stockholders as their rights may appear."

On the twenty-fifth day of August, 1902, in the vacation of court, a receiver was appointed, and a temporary injunction was granted according to the prayer of the complaint. H. L. Ponder was the receiver, and as such he took charge and control of the assets of the defendant in this state.

No answer to the complaint was ever filed by the defendant.

On the fifth day of March, 1904, the National Bank of Commerce of Kansas City, Missouri, Traders' Bank of Kansas City and Holland Bank of Springfield, Missouri, filed a petition in this suit, and represented that the defendant was indebted to each of them ¹⁰⁷ in a large sum of money; that the intention of the plaintiff, acting in collusion with other stockholders and officers of the defendant, was to prevent its creditors from taking judgment against it; that Ponder, the receiver, had no experience in the lumber business; that the business of the company, under his management, has been conducted at a loss; that the expenses incurred under his management have been enormous and exceed the profits of the business; and that nothing had been paid under his management on their claims; and they asked that the property be sold to pay the debts.

Within a few days after the filing of the petition of the creditors, fifty-four other creditors joined them in asking for the sale of the property.

On the thirty-first day of May, 1904, the plaintiff and defendant answered and denied the allegations in the petition of creditors, and asked that their motion be overruled, and the administration of the receiver be continued under the orders of the court.

On the thirteenth day of July, 1904, upon the final hearing of the cause, after hearing the evidence adduced, the court found the defendant insolvent, and its assets trust funds due to its creditors, and appointed Ponder master to audit

their claims, and directed them to present the same to him for allowance; and gave directions to the master as to his mode of procedure; and ordered that the property of the defendant in this state be sold, and appointed Ponder commissioner for that purpose, and gave him directions as to the time, place and manner of the sale, and ordered how the proceeds of the sale should be disposed of.

On the ninth day of September, 1904, the commissioner reported that he caused the property of defendant to be advertised for sale, and also a notice that bids would be received for the property as a whole, prior to September 1, 1904, and that in pursuance of the last-mentioned notice he had received those bids, the highest of which was the bid of the Lesser-Goldman Cotton Company, the sum of \$85,000; and on the 23d of September, 1904, the master reported the claims, amounting to \$185,253.90, which had been heard, examined, investigated and allowed by him against the defendant, and the court approved the report, and allowed the claims, and ordered and decreed that, upon final distribution, the assets in the hands of the receiver shall be paid upon ¹⁰⁸ such claims, and on the same day rejected the bid, and ordered that the commissioner sell all the property of the defendant as in the former decree provided, "except that, after having offered the property as provided in the decree, he then shall offer the whole of it for sale in bulk, and if the same shall bring the sum of \$2,500 in excess of the total aggregate of bids made for the property as provided by the decree, then the property shall be sold to the highest bidder for the property in bulk"; the sale to take place on the thirty-first day of October, 1904, between the hours prescribed by law for judicial sales. On the first day of December, 1904, the commissioner reported that the property was offered for sale on that day, and purchased by Lesser-Goldman Cotton Company at the price of \$100,000, it being the highest and best bidder, and its bid being more than \$2,500 in excess of the aggregate amount of the bids made for the property in parcels, and it having complied with the terms of the sale.

On the twenty-fourth day of March, 1905, the defendant, and Ed. W. Culver and Newton Mills, stockholders of defendant, moved the court to discharge the receiver and require him to deliver to defendant all money, choses in action and other property now in his hands, or under his control, or which had been received by him at any time since

his appointment, because the appointment of the receiver is void, it not being shown by the complaint or other pleading, or by any evidence, that the court had any jurisdiction of the subject matter of this suit, or any right or power to appoint a receiver in this cause. And at the same time filed exceptions to the commissioner's report of sale, in part, as follows: 1. Because the sale was not made within the hours prescribed for judicial sales; 2. Because of the circulation of a report on the day and at the place of sale that the title to the property sold was defective; 3. Because the price for which the property sold was grossly inadequate.

On June 3, 1905, the plaintiff moved the court to permit her to take a nonsuit in this suit without prejudice.

Evidence was adduced and heard upon the motion to discharge the receiver and the exceptions to the report of sale by the commissioner, filed by the defendant, and by Ed. W. Culver and Newton Mills. Certified copies of the proceedings of the circuit court of Jackson county, in the state of Missouri, in Mary ¹⁰⁹ C. Culver against Culver Lumber and Manufacturing Company, and of the proceeding of the district court of Wyandotte county, in the state of Kansas, in Mary C. Culver and H. A. Culver against the Culver Lumber and Manufacturing Company were a part of the evidence. From these transcripts the following appears: In the two suits complaints similar to the one in this case were filed on the twenty-fifth day of August, 1902. In the first suit, brought in the circuit court of Jackson county, in the state of Missouri, the plaintiff asked that the corporation, the Culver Lumber and Manufacturing Company, be dissolved, and in both suits the plaintiffs asked that a receiver be appointed to take possession of all the defendant's property in the state in which he was appointed; that its assets be converted into cash, and, after the payment of the expenses and costs, the debts of the corporation be paid, and the remainder be distributed among the stockholders. In both cases a receiver was appointed, and he qualified and entered upon the discharge of his duties. In the case brought in the circuit court of Jackson county, Missouri, the creditors of the corporation proved their claims, which were allowed by the court; the property of the corporation in the state of Missouri was converted into money and paid pro rata upon the claims of creditors; and the receiver was discharged. In the other case the creditors proved their claims, which the court

allowed, and the receiver was ordered to convert the property into money for distribution among them, which does not appear from the transcript to have been done.

So far as appears from the record in this case, M. C. Culver, Elias W. Culver, her husband, Ed. W. Culver, H. A. Culver, and J. E. Culver, her sons, and Newton Mills were the stockholders of the defendant corporation. Elias W. Culver was its president, Ed. W. Culver, treasurer and H. A. Culver, manager. For twelve or sixteen months after the appointment of Ponder receiver, H. A. Culver was the receiver's manager of the property in his hands, and after that Elias W. Culver filled that place. H. A. Culver operated a mill under a lease from the receiver after he ceased to be a manager. M. C. Culver, Elias W. Culver, H. A. Culver and Newton Mills proved claims against the defendant in this suit; and Mills offered a bid for the property at the sale which was rejected by the court. The commissioner commenced ¹¹⁰ selling the property at 10 o'clock A. M., and continued selling, with the exception of an hour at noon, until it was disposed of, which was after 5 o'clock in the evening.

The value of the property was variously estimated by witnesses. M. La Fore, who bid at the sale for the property \$97,000, and bid no more because he heard that the title was defective, says it was worth \$250,000; H. L. Ponder, the receiver, says it sold at a fair price; T. J. Shannon, \$200,000, but did not believe it would sell for that; H. A. Culver says it was worth \$300,000, but he consented to the sale at \$85,000, and sought to have the chancellor approve it at chambers; E. J. Mason and S. C. Dowell thought it was worth \$100,000.

On the third day of June, 1905, the court overruled the motion of the defendants, Ed. W. Culver, and Newton Mills to discharge the receiver and the exceptions to the commissioner's report on sale, and the motion of the plaintiff for permission to take a nonsuit.

The object of this suit and the two suits in the states of Missouri and Kansas was to wind up the business of the defendant company—to ascertain its indebtedness, convert its assets into money and pay its debts with the same so far as it will extend. This relief was asked in all three of the suits. It had property in three states, and for that reason brought the three suits.

Mrs. M. C. Culver was the plaintiff in the three suits. She owned the majority of the shares of the capital stock. No answer was filed in any of the cases. Forty-three of the principal creditors, intervening, asked that the assets of the company be sold and the discharge of the receiver. Plaintiff and defendant answered their complaint or petition, and insisted on the continuance of the administration of the receiver. For about two years and seven months there was no opposition to the suit. Four of the six stockholders proved claims against the defendant in this suit, and they owned in the aggregate two thousand nine hundred and seventy-nine shares of the three thousand shares of the capital stock. The president and general manager of the company aided the receiver and participated in his administration of its assets. In fact, the record in this court indicates that all the stockholders and creditors consented to and approved the complaint and the proceedings of the court until after the creditors had proved their claims and the final decrees had been made and ¹¹¹ the property sold thereunder, and the commissioner had reported the sale. Under such circumstances, had the court the right to wind up the affairs of the defendant and close its business? Mr. Justice Bigelow, speaking for the court in *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490, said: "We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances or quantity: Angell & Ames on Corporations, sec. 127 et seq.; 2 Kent's Commentaries, 6th ed., 280; Mayor etc. of Colchester v. Lowton, 1 Ves. & B. 226, 240, 244; Binney's Case, 2 Bland, 99. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed upon them by their charters. Corporations established for objects quasi public, such as railway, canal, and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall

within the exception; as also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained from alienating their property, and compelled to appropriate it to specific uses, by mandamus or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as ¹¹² soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation, short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority." See to the same effect, *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581; *Berry v. Broach*, 65 Miss. 450, 4 South. 117; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; 2 Cook on Corporations, sec. 629; 1 Morawetz on Corporations, secs. 284, 285, 413; 2 Beach on Private Corporations, sec. 781; Taylor on Private Corporations, sec. 431; Clark on Corporations, p. 445; 5 Thompson on Corporations, sec. 6685.

The allegations of the complaint are admitted by the failure of the defendant to answer the same. Among other things plaintiff alleges therein that the president, secretary, and treasurer of the company, without the authority of the board of directors, have purchased real estate, and recklessly and extravagantly and unnecessarily expended about \$5,000 in buildings thereon and the secretary and treasurer have so carelessly, recklessly and extravagantly operated the business

of the defendant at Kansas City, Kansas, as to involve the defendant in the indebtedness of \$30,000, and have applied a large amount of money and property belonging to the corporation to their own personal use and benefit; that such recklessness and extravagance alarmed the large creditors, and caused them to become so urgent in their demands as to induce the president to enter into an agreement in writing in and by which J. H. Jarrett and Frank I. Buckingham, both of whom are inexperienced in the lumber business, were to be placed in the absolute charge and control of the entire business of the defendant, including the collection of money, drawing checks, the sale of defendant's output or product, and everything else that could be done by the defendant through its duly authorized officers; that under this agreement they have taken possession of all the property of the defendant in Kansas and Missouri and are arbitrarily refusing to permit the officers, directors, and legal managers of the corporation to have any control in the management of its business, which ¹¹³ by their management will be greatly imperiled and entirely wrecked; that she has requested its directors and officers to bring suit to set aside the contract and take the management of its business, and they refused so to do; that the defendant is a foreign corporation, and its employes and creditors are threatening to attach its property in this state, and thereby to sacrifice a large amount of its property; and that its indebtedness amounts to about \$250,000. From all of which it appears that the corporation is seriously threatened with insolvency by the frauds and mismanagement of its officers; and the evidence in this case tends strongly to corroborate this conclusion, if it does not prove it. Under such circumstances, it seems, it would be the exercise of sound judgment to wind up the affairs and close the business of the corporation.

Plaintiff owns a majority of the shares of the stock, and is entitled to control the business of the corporation: *Pratt v. Jewett*, 9 Gray, 34; *Von Schmidt v. Huntington*, 1 Cal. 55; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412. There is no reason why she should not be entitled to protect her interest in the same manner as a majority in number of the stockholders could do if they owned it. The corporation consented to her doing so, and the stockholders acquiesced, until it was too late to withdraw con-

sent. Forty-three creditors, representing at least \$125,260.73 of the \$185,253.90 proved against the corporation, join her in asking for the relief. In doing so they asked a court of equity to grant equitable relief over a subject matter coming within its jurisdiction. Creditors do not, and stockholders have no right to, complain.

At the time of the institution of this suit the property of the corporation was in a precarious condition. It was threatened with attachment by creditors, which begun, it being a foreign corporation and considerably in debt, the probability is all the creditors, for their own protection would have been forced to attach. In that event the probable result would have been the sacrifice of its property and hopeless insolvency. Its officers were recklessly and extravagantly managing its business affairs, involving it in debt, and converting its property to their own use. Its board of directors, although requested to do so, refused to interfere. The interposition of a court of equity and the appointment of a receiver ¹¹⁴ were necessary, and demanded for the protection of stockholders and creditors: *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361, 8 Sup. Ct. Rep. 887, 31 L. ed. 694; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29 L. ed. 963; *Gluck and Becker's Receivers of Corporations*, 2d ed., sec. 9, and cases cited; *Beale on Foreign Corporations*, sec. 791; *Alderson on Receivers*, sec. 362; *High on Receivers*, sec. 306, and note.

Courts of equity have no right or authority to dissolve a foreign corporation, or wind up its business, but they may, in cases like this, take charge of its property within the jurisdiction of the court, and enforce the rights of creditors and stockholders in respect to the same, where it can be done by the exercise of equity jurisdiction. As the affairs and business of the corporation in the state of Missouri, its domicile, have been wound up, and the receiver appointed for that purpose discharged, and creditors have proved their claims here, it will not be necessary to remit any part of the assets in this state to that state, but the same may be fully disposed of here according to the respective rights of creditors and stockholders therein.

The trial court did not err in refusing to allow the plaintiff to take a nonsuit. At the time she asked for the privilege to do so, creditors had intervened, a final decree had been ren-

dered and under it the property involved had been sold, and creditors had proved their claims against the corporation. Other parties had acquired rights, and she no longer had power to control the suit: 1 Daniell's Chancery Pleading and Practice, 6th ed., marginal pages 793, 794, and cases cited; *Cromwell v. MacLean*, 123 N. Y. 474, 25 N. E. 932.

The motion to discharge the receiver was properly overruled; and the court committed no reversible error in overruling the exceptions to the commissioner's report of sale. The sale commenced within the hours prescribed by the decree of the court. Everyone present had the opportunity to bid, and there is no evidence that anyone lost a bid by continuing the sale beyond the time prescribed. There is no evidence that the reports that the title to some of the lands sold were defective were false, and therefore affected the sale. There was a contrariety of opinion as to the value of the land. Three witnesses testified that it sold for its value; and three valued it from \$200,000 to ¹¹⁵\$300,000, and facts proved weakened their evidence. The chancellor was the judge of the weight of the evidence and the credibility of witnesses, and the evidence does not show that he erred in his judgment. The court did not abuse its discretion in approving the sale: See *George v. Norwood*, 77 Ark. 216, 113 Am. St. Rep. 143, 91 S. W. 557; *Johnson v. Campbell*, 52 Ark. 316, 12 S. W. 578; *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865; *Waldo v. Thweatt*, 64 Ark. 126, 40 S. W. 782; *Colonial & United States Mortgage Co. v. Sweet*, 65 Ark. 162, 67 Am. St. Rep. 910, 45 S. W. 60.

Decree affirmed.

Grounds for the Appointment of a Receiver for a corporation and the jurisdiction of courts of equity to make such appointments are discussed in the note to Hall v. Nieukirk, post, p. 88.

STATE v. VAUGHAN.

[81 Ark. 117, 98 S. W. 685.]

GAMING.—Betting on Horseracing is not within a statute making it a crime to bet “on any game of hazard or skill.” (pp. 30, 31.)

NUISANCE.—A Poolroom or Turf Exchange, maintained to facilitate betting on horseraces, is a common-law nuisance, whether or not such betting is prohibited by statute. (p. 31.)

NUISANCE—Poolroom.—An Injunction will not lie at the instance of the state to restrain the maintenance of a poolroom which is a public nuisance, if it does not affect private property rights or public privileges. (pp. 35, 36.)

INJUNCTION.—The Criminality of an Act sought to be enjoined neither gives nor ousts jurisdiction in chancery. (pp. 36, 37.)

Robert L. Rogers, attorney general, Lewis H. Rhoton, prosecuting attorney, Bert Brooks, city attorney, and W. E. Atkinson, for the appellants.

J. W. & M. House, for the appellees.

¹¹⁹ HILL, C. J. The attorney general of Arkansas, the prosecuting attorney of the sixth judicial circuit, and the mayor and city attorney of Little Rock brought a bill in chancery against Vaughan, Furth, Faucette and others, in the name of the state of Arkansas and the city of Little Rock, seeking to enjoin Furth from operating a poolroom at a place in the city of Argenta near the Free Bridge which connects Argenta and Little Rock, and that the other defendants be enjoined from permitting or assisting, in the several ways alleged, said Furth in conducting said poolroom. The defendants answered, denying many allegations of the bill, and to this answer the state and city demurred, and the case was determined on the demurrer, the court sustaining it, and the state and city rested upon it and appealed. The review here is limited to the admissions and allegations in the answer and the undenied allegations of the complaint, as all other allegations were eliminated by trying the case on the sufficiency of the answer. ¹²⁰ The material parts of the answer, aside from its denial of the allegations of the complaint, are as follows: “It is true that the defendant, Bob Furth, operated what is known as a turf exchange or poolroom, where money is received, won and lost on horseraces, and where tickets for pools on horseraces run, or to be run, at various and divers racecourses in the state of Arkansas and

throughout the United States, are bought, sold and cashed.” “That in point of fact there are not more than fifteen or thirty people who visit said turf exchange daily, and that neither women nor children are permitted in said poolroom or turf exchange. And they state that said poolroom or turf exchange is conducted as a quiet, orderly business, and that no persons visit the same except those who desire to do so, and that disorderly or dissolute characters are not allowed or permitted to visit there, and are not in the habit of doing so. It is true that he has caused the said turf exchange to be advertised by a short notice in one of the Little Rock papers, and that he has at times operated a carriage from said city of Little Rock to said poolroom. That the business only attracts such as desire to purchase tickets or pools on horseraces, and that disorderly or lewd women or the law-breaking class are not in the habit of attending said poolroom or turf exchange. And that no one is disturbed by the gathering of the people in or about said premises. They further state that the city of Little Rock has no corporate property whatever that is in any way affected by the alleged public nuisance as described in said complaint. They further state that the state of Arkansas has no property interest in the matters complained of, and that, if said defendants are violating any law, the criminal courts of the state have ample power and authority to prosecute the defendants for such offenses, and that the charter of the city of Argenta authorizes said city to punish or abate a nuisance carried on as alleged in the complaint.”

The first question under inquiry is whether betting on horse-racing is gambling within the meaning of the statutes against gaming.

The general statute—the only one of them under which it could fall—defines the act therein made criminal to be “betting any money or any valuable thing on any game of hazard or ¹²¹ skill”: Kirby’s Digest, sec. 1740. It contemplates that the game be “played,” for the next section provides that it shall not be necessary for the indictment to allege with whom the game was played: Sec. 1741. In construing these statutes in 1861 Chief Justice English for this court, said: “But we do not think the legislature intended to embrace horse-racing by the words ‘any game of hazard or skill’ ‘played,’ etc., however vicious such sports may be”: *State v. Rorie*, 23 Ark. 726. In 1893 this court had before it betting on a

game of baseball, and it was held to be criminal because on a game of skill, and the distinction that horseracing was not a game but a sport was approved: *Mace v. State*, 58 Ark. 79, 22 S. W. 1108. Some states sustain this distinction, and hold horseracing to be a sport and not a game, within the gaming statutes, but the weight of authority is to the contrary: 20 Cyc. 884; 14 Am. & Eng. Ency. of Law, p. 682. It will not do to overrule *State v. Rorie*, 23 Ark. 726, merely because against the weight of authority; there is good reason to sustain the distinction therein made, and it has been acquiesced in by the state for forty-five years, when at any time it could have been changed by legislation. Therefore it must be taken in this case that betting on horseracing is not a crime of itself.

The quoted parts of the answer admit the maintenance by Furth of a turf exchange or poolroom, wherein money is received, won and lost on horseraces, where tickets for pools on horseraces run or to be run in Arkansas and elsewhere are bought, sold and cashed; that fifteen to thirty persons daily visit the poolroom for the purpose of betting on the races or buying, selling or cashing pools on the races; that said business is advertised, and at times a vehicle to bring patrons to it has been furnished.

What is the status of such a house, notwithstanding it is conducted in a quiet and orderly manner without unusual noise or disorderly conduct? At common law there were no statutes against gaming, yet the maintenance of a gaming house was a criminal nuisance, indictable and punishable as such. Mr. Justice Scott for this court said: "Independent of any statute, the keeping of a common gaming-house is indictable at common law on account of its tendency to bring together disorderly persons, promote immorality and lead to breaches of the peace. ¹²² Such an establishment is thus a common nuisance": *Vandeworker v. State*, 13 Ark. 700. Chief Justice Watkins for this court said: "At common law, gaming-houses were indictable as a public nuisance (*Vandeworker v. State*, 13 Ark. 700), but unless restrained by express statute ordinary wagers or betting were tolerated as being for amusement or recreation": *Norton v. State*, 15 Ark. 71.

In *Thatcher v. State*, 48 Ark. 60, 2 S. W. 343, the court went into the subject of gaming, bawdy and disorderly houses being common-law nuisances, and held that they were such,

not from the noise or disorder, but on account of the evil tendency of the business there conducted. Mr. Wharton says: "It is at common law not indictable for persons to engage in gaming in private, or to conduct a single game of chance in public. But when gaming is there publicly known to be carried on, however secluded the place may be, and when unwary and inexperienced persons are there enticed and fleeced, then the parties concerned are indictable for nuisance, irrespective of any particular statutes": 2 Wharton's Criminal Law, sec. 1465.

Mr. Bishop says a common gaming-house is a nuisance, because those attracted to it, especially youths, are there lured to vice, and youths may be as effectually lured by a noiseless process as by any other: 1 Bishop's Criminal Law, secs. 1135, 1136. Therefore it follows that the fact that betting on horse-racing is not within the gaming statutes does not prevent a house maintained for such betting being a criminal nuisance. As seen, the evil character of the business, and not the violation of express statutes, is what stamps it as a nuisance.

Turning more directly to the case in hand, do poolrooms fall within the definition of common-law nuisances, whether the games or sports bet upon are contrary to statute or not?

Judge Cooley, speaking for the Michigan court, drew a vivid picture of the evils of betting, and showed that, even where individual wagers were tolerated by law, a house maintained to carry on a betting business was unlawful: *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557, 16 N. W. 442. The case of *State v. Nease*, 46 Or. 433, 80 Pac. 897, is much in point, as these excerpts will show: "The evidence shows that he [the defendant] was the keeper and proprietor of ¹²³ what is called a 'turf exchange' or poolroom on one of the principal thoroughfares of the city, at which persons daily congregate for the purpose of betting upon horseraces run in other states and repeated to him by telegraph. . . . That such a house is a gaming or gambling house, and punishable as a nuisance at common law, whether betting on a horserace is a crime or not, has so often and uniformly been held by the courts that it is no longer open to discussion. There is no dissent in the adjudged cases, and it is unnecessary to do more than cite the authorities." (Citing many cases.) See, also, 20 Cyc. 893, 894, notes. The foregoing question must be answered affirmatively.

The common law is put in force in this state, and the punishment for common-law offenses not covered by statute is fixed as a fine not exceeding one hundred dollars and imprisonment not to exceed three months: Kirby's Digest, secs. 623, 624.

These statutes have been held applicable to a gaming-house as a common-law misdemeanor: Vandeworker v. State, 13 Ark. 700; Norton v. State, 15 Ark. 71; Thatcher v. State, 48 Ark. 60, 2 S. W. 343; 1 Bishop's Criminal Law, sec. 1137. Each period in which a nuisance continues is a separate offense: Wharton's Criminal Law, sec. 1419.

In addition to proceeding by fine and imprisonment, the state may have a judgment abating the nuisance and execution therefor: Wharton's Criminal Law, sec. 1426; Bishop's Criminal Law, sec. 1179; Kirby's Digest, sec. 2464.

The court has gone fully into the question of criminality of maintaining a poolroom and the remedies therefor, in order to ascertain whether a chancery court by injunction can restrain a person or persons from carrying on such business.

There are some courts of learning and ability holding that common-law nuisances, such as illegal tippling-houses, disorderly houses, bawdy-houses and gaming-houses, may be restrained by injunction. These cases go back to State v. Crawford, 28 Kan. 726, 42 Am. Rep. 182, in which it was held that an illegal drinking saloon (one run counter to a prohibition law of the state) could be closed by injunction, although in that particular case it was not done, on account of the sufficiency of a statutory remedy reaching the evil. Mr. Justice Valentine thus stated and commented upon the case: "This action was originally instituted ¹²⁴ in the district court of Shawnee county by the county attorney of such county, in the name of the state, for the purpose of perpetually enjoining the further continuance of an illegal liquor saloon, in which intoxicating liquors were illegally, continuously and persistently sold to be drunk on the premises as a beverage. . . . It must be admitted that this is a rare proceeding—so much so as to startle old and experienced practitioners, and yet, if it were ascertained, after a careful examination of all its elements, to be founded in reason and justice, and to come within the principles of long-established equity jurisprudence, it should not be dismissed uncere- moniously, or denied a respectful hearing, simply because

of its unquestioned and admitted novelty." Then the learned justice plausibly contends that such a use of the injunction accords with the principle of equity jurisprudence: See *State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646, and *Weakley v. Page*, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552, where cases supporting this view are reviewed, and other cases along the same line may be found in appellant's brief. The same question came before the St. Louis court of appeals when Seymour D. Thompson was a member of that court, and that able jurist delivered an opinion completely answering the contention of the Kansas court in the Crawford case. He showed by authority and reason that the jurisdiction of courts of equity to restrain public nuisances was limited to these three classes: 1. To restrain purpresture of public highways or navigation; 2. To restrain threatened nuisances dangerous to the health of a community; 3. To restrain ultra vires acts of corporations injurious to public right.

The court proceeds: "Unquestionably, the exercise of equity jurisprudence in these three classes of cases is an exception to a very general, well-understood, and important rule. That rule is, that a court of equity has no jurisdiction in matters of crime. In these three classes of cases jurisdiction is, however, exercised for special reasons, although unquestionably the nuisance complained of is a misdemeanor and subject to prosecution by indictment": *State v. Uhrig*, 14 Mo. App. 413. Chancellor Kent said: "If the charge be of a criminal nature, or an ¹²⁵ offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court (a chancery court), which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate. . . . I know that the court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private rights; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less preliminarily by injunction, to put down a nuisance which did not violate the rights of property, but only contravened the general policy": *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371.

The Illinois court said: "It is elementary law that the subject matter of the jurisdiction of the court of chancery

is civil property. . . . The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property": *Sheridan v. Colvin*, 78 Ill. 237. Again, it is well said: "It is no part of the mission of equity to administer the criminal law of the state or to enforce the principles of religion or morality, except so far as the same may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance": *Cope v. District Fair Assn.*, 99 Ill. 489, 39 Am. Rep. 30. In *People v. Condon*, 102 Ill. App. 449, the subject of equity jurisdiction to enjoin a pooling and betting business was gone into fully and the authorities reviewed, and the result thus summed up: "1. That a court of equity has no jurisdiction over matters criminal or merely immoral; 2. That a court of equity will sometimes enjoin a public nuisance; 3. That this will be done in no case where the state is the complainant, unless it be clearly shown that such nuisance affects public property or public civil rights." A learned text-writer, whose works are standard authorities, says: "Nuisances that arise from the acts of men that, for the time being, make the property devoted to their purposes a nuisance, but which cease to be so when the use is stopped; such as disorderly houses, gaming-houses and cockpits, that are *malum in se* and common nuisances purely, and only punishable by indictments": 1 Wood on Nuisances, sec. 14.

The supreme court of the United States considered the use¹²⁶ of the injunction to restrain public nuisances and preserving rights of the public in highways when the government secured an injunction against strikers interfering with interstate mail and traffic at Chicago in the railroad strike of 1894, and Mr. Justice Brewer, speaking for an undivided court, said: "The difference between a public nuisance and a private nuisance is that one affects the public at large and the other only the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. . . . Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the law of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with

property or rights of a pecuniary nature; but when such interferences appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they were accompanied by, or are themselves, violations of the criminal law": *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092.

It is demonstrably true that it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the state to restrain a public nuisance where the nuisance is one arising from the illegal, immoral or pernicious acts of men which for the time being make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law. On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery. Applying these principles here, it is seen that the admissions of the answer prove Furth to have been daily violating the criminal laws, but there is an absence of any showing that the acts constituting the crime reached to any of the grounds of equity jurisdiction. In some cases where the jurisdiction of equity is sought to restrain a criminal nuisance,¹²⁷ there are allegations that the criminal processes are inadequate to afford relief from connivance of the officers or other reasons. Happily, that unfortunate situation is not presented here; the prosecuting attorney joins in this complaint, and allegations involving the officers of Argenta in the maintenance of this poolroom were denied in the answer, and the state elected to treat the answer as true. It is not only the right, but the sworn duty, of every prosecuting attorney to proceed by information in justice's or circuit court to close these illegal places when they have information of them; it is not only the right but the duty of every grand jury to find the existence of such places if they exist and to indict the keepers thereof. It is also the privilege of any citizen to proceed against them at any time by affidavit before a justice of the peace.

There is no possible excuse under the law for a poolroom—a place maintained for carrying on or facilitating betting on horse-races or any other sport or game or contest or other

event upon which wagers are laid—to exist in Arkansas for one minute. Its maintenance is a crime, nothing more, nothing less.

Persons charged with crime are entitled to a jury trial, and this right must not be taken from them under guise of an injunction against a nuisance.

The chancellor was right in refusing to entertain jurisdiction, and the judgment is affirmed.

Bookmaking and Pool-selling constitute gambling or gaming: *State v. Thompson*, 160 Mo. 333, 83 Am. St. Rep. 468; *St. Louis Fair Assn. v. Carmody*, 151 Mo. 566, 74 Am. St. Rep. 571. And betting on the result of a horserace is gaming: *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557. A room used to facilitate betting on horseraces is a gaming-room: *People v. Weithoff*, 93 Mich. 631, 32 Am. St. Rep. 532. And a place where people habitually assemble to bet on races may constitute a common nuisance: See the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 230.

The Maintenance of a Nuisance may be Enjoined, notwithstanding it is punishable as a crime: *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407; note to *Crighton v. Dahmer*, 35 Am. St. Rep. 674.

MONTGOMERY v. DANE.

[81 Ark. 154, 98 S. W. 715.]

HOMESTEAD—Purpose of Exemption.—The protection of the family from dependence and want is the object of the homestead law; apart from the family the debtor is entitled to no consideration. (p. 39.)

HOMESTEAD—Abandonment by Husband Alone.—A husband cannot, by deserting his family and abandoning the homestead, let in the claims of his creditors against it, if the family desire to continue to reside thereon and preserve its homestead character, and he makes no attempt to furnish them another home. (p. 42.)

J. T. Lomax, for the appellant.

Witt & Schoonover, for the appellee.

155 HILL, C. J. Montgomery sued Mrs. Dane for a tract of land. She answered, claiming ownership by a purchase from one Hamil, to whom she and her husband had conveyed, and asserting and claiming a homestead right in the property, and alleging that it was her husband's homestead at time of its sale under execution under which Montgomery purchased; that the sale was for a debt, not a lien on a homestead, and

that Montgomery had acquired no title from his sale, and the same was ¹⁵⁶ a cloud on her title, and alleged a redemption from the sale to Hamil, and she asked a cancellation of Montgomery's title and the quieting of her title. The cause was, after this answer and cross-complaint, transferred to equity, and prayer of cross-complaint granted, and Montgomery appealed.

The transaction with Hamil proved to be no more than a redemption of the property from a mortgage executed by herself and husband.

The case turns on whether or not the land was a homestead at the time of sale. If it was not, Montgomery's title would prevail, possibly subject to subrogation of Mrs. Dane to the Hamil mortgage; and if the property was a homestead the deed of Montgomery, based on an execution sale under a judgment obtained on a note given for a fine and costs, should be canceled. The facts were that Dane and wife lived upon the land for many years as a home, and he had no other property, and in 1896 they separated. Both left the place, but not the county at that time. There were no children in the family, and Mrs. Dane went to a married daughter's house when they separated. One Douglass lived on the land in 1897. Whether he paid rent to Dane is not clear, but Dane went back to the land in 1898, and lived there till he mortgaged it to Hamil, and he then left the state. Mrs. Dane then took charge of the land, and rented it, and collected rents from different tenants, who occupied it until 1900, when she returned to it with her grandchildren and great grandchildren, and has since occupied it with them.

The judgment was obtained against Dane on the 24th of April, 1899, and execution sale took place June 15, 1901. A deed to Hamil, which was in fact a mortgage, was executed on the day before the execution sale, and subsequently, on Mrs. Dane's paying the debt, Hamil conveyed to her. This was the second mortgage given Hamil. The first was when Dane left and Mrs. Dane refused to sign it, but this deed she signed on promise of Hamil that on repaying the debt he would convey to her. Dane was in Missouri when he signed this instrument, and when the sale occurred. Mrs. Dane was looking after the sale. Whether she forbade it and then asserted her homestead rights is a matter in conflict, but certainly she was on the ground, asserting her right to its occupancy as a homestead. Mr. and Mrs. Dane were not

¹⁵⁷ divorced; they simply separated. In 1900 Mrs. Dane purchased a forty-acre tract, but she never made it her home.

She testified that her only reason for leaving the home place when she and her husband separated was that she could not live there alone, and had no one to stay there with her. She went to live with her married children, and lived with them temporarily till she could return to the home place. She retained control of it through tenants from the time her husband left it until she personally returned to it. She did not want to leave the place, and only left from necessity, and never intended to abandon it, is her testimony, and it is found true by the chancellor.

Under many decisions of this court, recently reviewed in *Newton v. Russian*, 74 Ark. 88, the temporary absence from the home with intention to return was not an abandonment by Mrs. Dane. The abandonment by Dane is a different matter, and the question is whether his abandonment of the homestead and his family will let in claims of his creditors when the wife is not joining him in the abandonment and desires to continue to reside upon it and to preserve it as the family homestead. The constitutional provisions are: "The homestead owned and occupied as a residence to be selected by the owner": Const., art. 14, secs. 3-5; Kirby's Digest, 3898-3900. The act of 1887 renders void any conveyance affecting the homestead with a few exceptions, unless the wife joins in the execution of it and acknowledges it, and further provides that the debtor's right to it shall not be lost by omission to select and claim it before sale, but he may select and claim it after as well as before sale and set up the homestead right as a defense when suit is brought for possession; and if he neglects or refuses to make such claim, his wife may intervene and set it up: Kirby's Digest, secs. 3902, 3903. It has often been said that the protection of the family from dependence and want is the object of the homestead law; that apart from the family the debtor is entitled to no consideration: *Harbison v. Vaughan*, 42 Ark. 539; *Hollis v. State*, 59 Ark. 211. This being the controlling thought in the homestead provisions, it naturally followed that the courts have held that the abandonment or desertion of the family and homestead by the husband did not forfeit the homestead right of the family, so long as he ¹⁵⁸ was acting independently and the family were seeking the shelter of the homestead.

Thompson says: "But it has been frequently decided that what amounts to an act of desertion by the husband cannot have the effect of changing the home of either the husband or his deserted family. . . . The homestead character was held to remain as long as the wife manifested an intention to remain and not abandon the home. And even where the husband's removal of the furniture compelled her to live at another place, and her intention to remain was only evinced by giving her personal attention to the house, still there was no abandonment": Thompson on Homesteads and Exemptions, sec. 277.

If written of this case, the statement above quoted could not have been more in point, and this text does not come as a new doctrine, for it was expressly approved in *Hall v. Roulston*, 70 Ark. 343, 68 S. W. 24, and *Newton v. Russian*, 74 Ark. 88, 85 S. W. 407, and approved in principle in *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28, 27 S. W. 73. See, also, *Moore v. Dunning*, 29 Ill. 130, 81 Am. Dec. 301, and note, which case was approved in the *Hollis*, *Roulston* and *Russian* cases.

The principles of these decisions control here. Whether the act of the husband be a separation mutually agreed to or an abandonment, the controlling factor remains—he is not acting for the family but for himself in derogation of the family rights, and the whole object of the homestead law would be defeated if the homestead impressment was swept away by the act of the husband. Indirectly the husband could convey his homestead by simply quitting his family and letting in the sheriff when the policy of the law and the express statute of 1887 is to prevent that very situation. Where the wife or family refuse to obey the husband and father in leaving the homestead when he, in pursuance of his privilege as head of the family, seeks to take his family elsewhere, another question is presented, and one not before this court in this case.

It has been argued that *Pipkins v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433, *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648, and *Farmers' B. & L. Assn. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062, conflict with this conclusion; but far from it. In *Pipkins v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433, Mr. Justice Hemingway, for the court, said: "When the homesteader, with his family, abandoned the land as a homestead,

it became liable to attachment for his debts." ¹⁵⁹ The parenthetical qualification of the homesteader's right to abandon "with his family" showed that the learned justice, in applying the law to the facts of that case, had in mind that where there was an abandonment by the homesteader without his family joining in the abandonment a different question would be presented. In *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648, the rule above quoted was stated, but not stated fully and without the qualification of "with his family." It was not intended to change the rule in the *Williams-Pipkins* case, but it was merely stated in shorter form, and only so much as was pertinent to the case in hand. *Farmers' B. & L. Assn. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062, held that the act of 1887 is a limitation upon the right of the husband to convey his homestead, but not a limitation upon his marital and parental authority to select or abandon the homestead. This is manifestly true, but it is dealing with the rights of the husband and father as head of the family to select the home, abandon and select another or select none but to live in rented houses if he sees fit. These are considerations touching the right of a head of a family to control it, and relate to him when acting for the family, not when in derogation of the rights of the family and not when he deserts or abandons his family or voluntarily separates from them. When he deserts, abandons or separates from his family, he is then no longer its head, and is no longer acting for the family, but for himself, and against the family, and then it is that the law presumes he is a wanderer without home until he returns to his duty and his family: *Moore v. Dunning*, 29 Ill. 130, 81 Am. Dec. 301; *Hall v. Roulston*, 70 Ark. 343, 68 S. W. 24; *Newton v. Russian*, 74 Ark. 88, 85 S. W. 407. In *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648, there is the further holding that the legislature intended to create no new estate by the act of 1887, but prescribed the manner of executing instruments affecting the homestead, and recognized the homestead as the husband's, not the wife's, nor their joint property. This is manifestly the correct construction, and does not trench on the principle which the court is following in its conclusions herein.

The homestead being created for the benefit of the family, when the husband selects it and impresses it with the homestead character as the dwelling place of his family, then the

law frees it from his debts, and he cannot let in his debts against it when he separates from his family or deserts them and does not attempt ¹⁶⁰ to provide them another home or dwelling place or shelter, and does not seek to take his family with him, so long as they seek to continue to reside in the only home he has provided for them. It is within the letter, and most positively within the spirit, of the homestead law to extend its beneficence to the family under these circumstances.

Judgment affirmed.

Mr. Justice McCulloch dissents.

A Homestead Right is for the benefit of the entire family: *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927; *Martin v. Harrington*, 73 Vt. 193, 87 Am. St. Rep. 704. It is not lost by the death, marriage, or removal of some of the members of the family: *Lyons v. Audry*, 106 La. Ann. 356, 87 Am. St. Rep. 299, and cases cited in the cross-reference note thereto; *Davis v. Feltman*, 112 Ky. 293, 99 Am. St. Rep. 289. On the abandonment of homesteads generally see the note to *Burkhardt v. Walker*, 102 Am. St. Rep. 388.

BUTT v. STATE.

[81 Ark. 173, 98 S. W. 724.]

CONSPIRACY—Evidence—Declarations of Conspirator.—When a conspiracy has been shown, the acts and declarations of one conspirator in furtherance of the common design may be shown as evidence against his associates. (p. 45.)

CONSPIRACY—When Inferred.—If the Acts of two or more persons are aimed toward the accomplishment of some unlawful object, each doing a part, so that their acts, though apparently independent, are in fact connected, indicating a closeness of association and a concurrence of sentiment, a conspiracy may be inferred, although no actual meeting among them to concert means is proved. (pp. 45, 46.)

CONSPIRACY—Order of Proof.—It is Immaterial whether the evidence showing a conspiracy is introduced before or after the acts of the conspirators are received in evidence, if upon the whole case a conspiracy is shown. (p. 46.)

BRIBERY—Proof of Other Crimes.—While the prosecution cannot show separate and isolated crimes or facts having no bearing upon the crime under investigation, it may show all the circumstances connected with the particular crime, even if in so doing it has to bring to light other offenses. It may go back to the time when the intention to commit the crime in question was first formed, and trace

it through all the intervening circumstances to the consummation of the criminal act, and thus lay before the jury the whole transaction. (p. 47.)

BRIBERY—Evidence—Statement in Presence of Accused.—In the prosecution of a senator for bribery, it is competent to prove that, prior to the commission of the crime, another senator, in the presence of the defendant, suggested an organization to control legislation and exact money for the passage or defeat of bills, to which the defendant assented. (pp. 44, 49.)

ACCOMPLICE—Manner of Weighing Testimony.—To determine the truth or falsity of the testimony of accomplices, it should be weighed by the same rule by which the testimony of other witnesses is weighed; that is, by considering their connection with the crime and the defendant, their interest in the case, their appearance on the stand, and the reasonableness of their testimony, and its consistency with other facts proved in the case. (p. 50.)

CRIMINAL LAW—Doctrine of Reasonable Doubt.—The different items of evidence that go to establish guilt do not have to be shown beyond a reasonable doubt; that doctrine applies only to the guilt or innocence of the defendant upon the whole case. (p. 50.)

ACCOMPLICE—Who is not.—Mere Silence in the presence of a crime, or mere failure to inform the officers of the law when one has learned of the commission of a crime, does not make one an accomplice. (p. 50.)

CRIMINAL TRIAL—Misconduct of Attorney.—A remark by the prosecuting attorney in his closing argument in a bribery prosecution, that "in his opinion the state has made the strongest case against Butt that it has made in any of the boodle cases," is not prejudicial if the court, on the making of an objection, instructs the jury to disregard it. (p. 51.)

J. V. Walker and Sellers & Sellers, for the appellant.

R. L. Rogers, attorney general, Lewis Rhoton, prosecuting attorney, James A. Gray and De E. Bradshaw, for the appellee.

¹⁷⁷ RIDDICK, J. This is an appeal from a judgment convicting the defendant of the crime of bribery and sentencing him to pay a fine of two hundred dollars and to be imprisoned in the state penitentiary for the term of two years. The defendant was a member of the state senate in 1905, when a bill appropriating eight hundred thousand dollars for the completion of the state capitol was pending before the senate. The conviction was based on a charge that defendant paid Senator Adams one hundred dollars to induce him to vote for this bill. The evidence, so far as necessary to show the questions of law involved, was as follows:

It was shown by the testimony of witness Hinkle that, soon after the organization of the Senate in 1905, he, with a few ¹⁷⁸ other senators, including defendant Butt, was

present in the room of Senator Covington at the hotel, and that in the course of their conversation Covington said that by standing together they could control legislation, and in substance suggested that they organize and make money by demanding and receiving pay for the passage or defeat of bills. The witness said that he himself did not agree to this suggestion, though he made no response to it, but sat silent for a few minutes while it was discussed by the others, and then left the room and did not return. He further stated that he did not remember what the defendant Butt said in reply to this proposition of Covington, "more than that he seemed to agree," and that Butt thereupon made out a memorandum of the names of those senators that it was believed could be induced to enter the combination.

It was shown by another witness, Cook, that two or three months afterward, toward the latter part of the session, when bill No. 370, to appropriate eight hundred thousand dollars for the completion of the state capitol building and for other purposes, had been introduced in the Senate, Caldwell & Drake, a firm of contractors who had a contract for erecting the new capitol, and who were especially interested in the passage of this bill, paid to witness Cook a large sum of money, over twelve thousand dollars, to be used to influence members of the legislature. A large part of this, some four or five thousand dollars, was paid by Cook, acting for Caldwell & Drake, to Senator Covington, to be used for that purpose.

It was further shown by the testimony of Senator Adams that the defendant Butt paid him one hundred dollars to vote for the bill, with the promise of four hundred more when the bill became a law. After the Senate adjourned and the grand jury began to investigate these matters, this witness saw the matter in a new light, and says that he returned the money to Butt. Senator Hardy, another witness, testified that while the bill was pending Butt stated to him that there was a rumor that a large amount of money was being used to pass the bill, and that he could get five hundred dollars for voting for the bill. The language of this witness is not quite clear as to whether Butt stated that the witness or Butt could get the money. But, let it be taken either way, and it will be seen by reference to the testimony ¹⁷⁹ of Adams set out in the transcript that Butt approached Hardy in much the same way that he did Adams. Another witness, Hinkle, testified that after the bill was passed it was rumored that money

had been used, and that, being informed that Butt had paid Adams one hundred dollars to vote for the bill, he questioned Butt about it; that at first Butt denied it, but finally admitted that he had paid Adams money. Still another senator, Holland, testified that after the Senate had adjourned, and when Covington was being tried, he was told that Adams had returned the money, and he asked Butt about it, and Butt admitted that Adams had returned it, but later made a different statement.

Butt and Covington, who testified for him, both denied about all of this incriminating evidence. The testimony need not be set out here, for the question now is whether the evidence introduced by the state was competent and sufficient to sustain the judgment.

Counsel for appellant contends that there was not sufficient evidence of a conspiracy between Covington and the defendant, Butt, to justify the admission of the declarations and acts of Covington as evidence against the defendant. Before discussing the question, we will say that no declaration by Covington made in the absence of Butt was admitted in evidence. The statement of Covington, made in the presence of Butt, suggesting an organization to control legislation and to make money corruptly, to which Butt assented, is competent, whether there was a conspiracy or not. For that is, in effect, only showing the act of Butt himself. The statement of Covington was admitted as explanatory of this act, and to show to what Butt assented. But, if the evidence be true, it is difficult to believe that no conspiracy existed. When a conspiracy has been shown, then the acts and declarations of one conspirator in furtherance of the common design may be shown as evidence against his associates, and we think the evidence in this case sufficient to show that there was a conspiracy between Covington and Butt and others to pass bill 370 through the Senate by bribery.

In a recent case decided by this court the following extract from Underhill on Criminal Evidence was quoted with approval: "Direct evidence is not essential to prove the conspiracy. It ¹⁸⁰ need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from proof of facts and circumstances which, taken to-

gether, apparently indicate that they are merely part of some complete whole. If it is proved that two or more persons aimed by their acts toward the accomplishment of the same unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected and co-operative, indicating a closeness of personal association and a concurrence of sentiment, a conspiracy may be inferred, though no actual meeting among them to concert means is proved." This is a clear and correct statement of the law: Underhill on Criminal Evidence, sec. 491; Chapline v. State, 77 Ark. 444, 95 S. W. 477.

Nor is it material now whether the evidence showing the conspiracy was introduced before or after the acts of the confederate were received in evidence, it being sufficient if on the whole case a conspiracy is shown. Now, a conspiracy is a combination between two or more persons to do something unlawful or to accomplish something lawful by unlawful means: Commonwealth v. Waterman, 122 Mass. 43; 6 Am. & Eng. Ency. of Law, p. 832.

The evidence tends to show that early in the session at a meeting in his room, Covington made the suggestion to the defendant, Butt, and a few other senators present that they organize for the purpose of controlling legislation and making money out of it. The defendant Butt did not dissent from this bold proposition to combine for the purpose of extorting bribes, in other words, to go into it as a regular business, but, on the contrary, if the witness told the truth, he showed a ready response to it, and at once began in a practical way to carry out the suggestion by making a memorandum of the names of those senators who, it was believed, could be induced to join the combination. Later in the session we find these two men doing the very thing that was on that occasion proposed by one of them and assented to by the other. We find that one of them received several thousand dollars which he takes under a promise to use for the passage of this capitol bill through the Senate, and shortly¹⁸¹ after we find the other acting as a distributor of money for the passage of this bill. Now, it is certain that Butt did not pay out his own money in such liberal sums on this bill. If he paid out money, it was furnished by some one financially interested in the passage of the bill. The evidence shows that there were no others thus interested except the firm of Caldwell & Drake. They did pay out a large sum

to bribe senators to vote for this bill. It is therefore morally certain that, if Butt paid out money to bribe Adams on this bill, the money he used came from Caldwell & Drake, either directly or through some agent of theirs. As the evidence shows that this money of Caldwell & Drake was paid to Covington, who was to secure the passage of the bill with the money paid him, it seems probable that Butt was acting under Covington. But, whether that be so or not, they were both engaged in the same undertaking to pass this bill by the corrupt use of money, and were acting for the same principal. Taking the whole evidence together, we think it was amply sufficient to show a conspiracy between them.

But, even if we concede that no conspiracy was shown, a majority of us think that this evidence was competent on another ground. For, while you cannot show separate and isolated crimes or facts having no bearing on the crime under investigation, you can always show all the circumstances connected with the particular crime, even if in doing so you have to bring to light other offenses. You can go back to the time when the intention to commit the crime under investigation was first formed and trace it through all the intervening circumstances to the consummation of the criminal act, and thus lay before the jury the whole transaction. This is necessary in order that they may correctly judge the motives and conduct of the defendant under investigation. "If," says the author of a recent work, "several crimes are so intermixed or blended with one another or connected so that they form an indivisible criminal transaction, and a complete account of any of them cannot be given without showing the other, any or all of them are admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme": Underhill on Criminal Evidence, sec. 88.

You might as well expect that one should be able to judge correctly the merits of a play, and of the motives and conduct of ¹⁸²the actors as displayed therein, by witnessing only the last scene of the last act, as to expect, where the crime under investigation is part of a connected scheme, that the jury should be able to determine the motives of the defendant and judge correctly of his guilt or innocence without any knowledge of the origin of the crime or the circumstances and motives that led up to it. The law does not blindfold courts and juries in that way, and it is always compe-

tent to show the beginning as well as the end of the criminal transaction.

Now, as before stated, the evidence tends to show that this crime had its beginning early in the legislative session. The rising curtain discloses defendant and certain other senators, guardians of the state, assembled in the room of Covington, president of the Senate, gravely discussing, not the good of the state, but how to take over the business of Cox and Cook, two noted lobbyists, control legislation, and make money out of the passage of bills. This was the beginning. Later, when the bill appropriating eight hundred thousand dollars of the state's money was introduced in the Senate, in which bill Caldwell & Drake, contractors of large means and rather lax ideas about the proper use of money, were greatly interested, an opportunity was presented to put into practice the plan agreed to by Covington and defendant at the beginning of the session.

They did not, however, put Cox and Cook out of business, but acted with them. Cook says that Caldwell put up over twelve thousand dollars to pass this bill. Of this Cook gave Covington seven thousand dollars, but two thousand five hundred dollars went for another purpose, leaving about four thousand five hundred dollars to be used in the passage of the bill through the Senate, with the promise of more if it became a law. Cook does not state what he did with the remainder, but he no doubt retained a liberal percentage. Cox appears only in the misty background, but he no doubt got his percentage also. So that the amount paid to Covington probably represents the bulk of that expended on the legislature. With this sum Covington was to pass the bill through the Senate. The evidence does not directly show to whom Covington distributed this money, or how much of it he retained himself, but it shows that very soon after it was placed in his hands the defendant appeared as the distributor of money to secure the passage of this bill.

¹⁸³ As the testimony of Hinkle shows that Covington knew that Butt was ready and willing to engage in a venture of that kind, it, as before stated, seems highly probable that, if Butt paid out any money to secure the passage of this bill, he secured it from Covington. These transactions, from the time the money was paid over by Caldwell to Cook until a portion of it was paid to Adams by the defendant, were all part of the same scheme to pass this bill by buying the

votes of senators. The evidence that money was paid by Caldwell to Cook and by Cook to Covington for the passage of this bill is competent, because it tends to show where Butt procured the money which he paid to Adams and explains the motives that lay behind this act of Butt. He had no personal interest in the passage of the bill, and there was no reason why he should squander money in that way. If it could not be shown where this money probably came from, the testimony of Adams that Butt paid him money to vote for the bill would seem unreasonable. But the whole thing is cleared when you trace the crime back to its source and view the whole transaction. You then see that Butt was not acting for himself alone, but that behind him was a party interested and willing to pay out large sums of money on this bill. Caldwell did not deal directly with these corrupt legislators, but his desire to make money out of the expenditure for which this bill provided was the moving force that led to this crime, and it was competent to show that he paid money and to trace this money through the different agents into whose hands it came in order to show the whole of the criminal transaction and to explain the motives of the different actors therein. A part of the route that the money took is shown by circumstances only. But, assuming that the witnesses spoke the truth, these circumstances are quite convincing, and to repeat again makes it seem very probable that the money used by Butt came through Covington, and that the whole of this evidence relates to the same criminal scheme. But whether he received it from Covington or not, the evidence tends strongly to show that the act of Butt was only a detail in a larger scheme carried out by Cox, Cook, Covington and others, and the whole can be shown. We think there can be no doubt of its competency: *Melton v. State*, 43 Ark. 367.

The objection to the testimony of McNemer, a witness who ¹⁸⁴ testified for the state in rebuttal as to the character of this defendant, on the ground that it was not confined to a time anterior to the commencement of the prosecution, is based entirely on the form of the question propounded to this witness and his answers thereto. In these the present tense is used, but his testimony shows clearly that he refers to a time previous to the prosecution. No special objection

was made at the trial to this testimony on that ground, and the exception must be overruled.

Coming now to the charge of the court, objection is made to the fourth instruction given for the state on the ground that "it overrules the statute, and tells the jury that an accomplice for the purpose of the trial is to be considered the equal of any other witness." But this is not so. The instruction says that, in order to determine the truth or falsity of the testimony of an accomplice, it should be weighed by the same rule as the testimony of other witnesses is weighed. This is correct, for the testimony of other witnesses is weighed by considering their connection with the crime and the defendant and their interest in the case, their appearance on the stand, and the reasonableness or unreasonableness of their testimony and its consistency with other facts proved in the case. The testimony of an accomplice should be weighed in the same way.

Instruction No. 8 requested by defendant was clearly erroneous, for it declared that the jury should not consider the fact that Cook delivered money to Covington to be used in the passage of bill No. 370, unless they found "beyond a reasonable doubt that such money or some part of it was delivered to defendant for the purpose of use in the passage of the bill." Leaving out all other objections, this court has several times held that the different items of evidence that go to establish guilt do not have to be shown beyond a reasonable doubt. That doctrine only applies to the guilt or innocence of the defendant on the whole case. As this instruction was properly rejected on that ground, we need not notice the other objections urged to it.

The contention is made that the question of whether or not the witness Hinkle was an accomplice should have been submitted to the jury. I felt some doubt myself on this point at first, but the definition of an accomplice quoted by appellant ¹⁸⁵ from Wharton shows that the evidence in this case falls short of showing that Hinkle was an accomplice: Wharton's Criminal Evidence, sec. 440. Mere silence in the presence of a crime, or the mere failure to inform the officers of the law when one has learned of the commission of a crime, does not make one an accomplice. Hinkle may have been an accomplice, but the evidence in this case does not show it, and the court did not err in refusing to submit the question

to the jury: *Melton v. State*, 43 Ark. 367; *Carroll v. State*, 45 Ark. 539.

We have carefully considered the other objections urged to the rulings of the court in giving and refusing instructions, and in our opinion none of these are tenable.

The prosecuting attorney in his closing argument to the jury said that "in his opinion the state had made the strongest case against Butt that it had made in any of the boodle cases." On objection being made, the court held the remark to be improper, and instructed the jury to disregard it. This ruling of the court was correct, for there was no need to make such a comparison. But, apart from that, the remark was in effect nothing more than the expression of an opinion by the attorney for the state that the case against the defendant was a strong one, and as such we doubt if it could under any circumstances be treated as prejudicial.

This brings us to the question as to whether the evidence was sufficient to sustain the verdict. We have already noticed this evidence, and it need not be repeated here. Whether the witnesses whose testimony implicates defendant and others in this crime spoke the truth was a question for the jury, and not for us. In discussing the case we have assumed that those facts were established which the jury had the right to find from the testimony before them, and the same rule must be applied on this point. Now, one senator testified positively and explicitly that the defendant paid him a bribe of one hundred dollars as alleged in the indictment. Three other senators testified to facts which tended to connect defendant with the crime and to show that he was guilty. Opposed to this testimony of the state is the testimony of the defendant and another senator who was accused of a similar crime, and who the evidence in this case tends to show was implicated in the crime charged against defendant. ¹⁸⁶ It was also shown that defendant had a good character previous to this prosecution. This evidence of his character is probably the most potent evidence in his behalf. In view of the fact that the defendant had previously borne an excellent character, and that it seems unnatural that a man of such character would so soon yield to temptation and be guilty of such a shocking disregard of his duty, there may be those who will disbelieve the evidence against him.

But, although a number of witnesses testified to the good character of the defendant, and only one testified to the con-

trary, yet the testimony of this witness received some confirmation from the lips of the defendant himself. For defendant, while on the witness-stand, after saying that he knew that Tom Cox, whom the evidence tends to implicate in this crime, had the reputation of being a "lobbyist and boodler," admitted that he had written to Cox and solicited his support in defendant's race for the presidency of the Senate, and had visited the home of Cox to see him when he was confined to his room on account of illness. Defendant gave explanations of these acts consistent with honest intentions on his part. But these admissions and the explanations which the production of this letter to Cox forced him to make may have aroused in the minds of the jury some suspicion that his character was not as good as his reputation. But while character and reputation may in doubtful cases be weighed with the other evidence in deciding whether one is guilty or not, it is no excuse or justification for crime. The jury have considered the evidence of defendant's character in connection with the other facts, and have found that he is guilty. After a full consideration of the evidence as found in the transcript, it makes the same impression on us, and we are of the opinion that the verdict was right.

Finding no error, the judgment is affirmed.

The Crime of Bribery is the subject of a recent note to *Rudolph v. State*, 116 Am. St. Rep. 38.

The Admissibility of Evidence of Other Crimes in criminal prosecutions is considered at length in the note to *Sykes v. States*, 105 Am. St. Rep. 976.

The Admissibility of Circumstantial Evidence in criminal trials is the subject of an extended note to *State v. Hudson*, 97 Am. St. Rep. 771.

SKILLERN v. BAKER.

[82 Ark. 86, 100 S. W. 764.]

TRIAL—Directing Verdict.—The Rule that When a Unimpeached Witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to can be drawn, the fact may be taken as established and a verdict directed on the evidence, does not apply where the witness is interested in the result of the suit, or facts are shown which may bias his judgment, or from which an inference may be drawn unfavorable to or against the facts testified to by him. (p. 54.)

TRIAL—Directing Verdict, When Improper.—When a defendant testifies positively that he served a notice on the plaintiff's agent,

it is improper for the court to assume such fact as proved and direct a verdict accordingly, if the agent testifies that he has no recollection of its service. (p. 55.)

COURTS.—The Circuit Court has No Original Jurisdiction to entertain an action on a note for one hundred dollars and interest, though joined with another note of which it has jurisdiction. (p. 55.)

Sain & Sain and W. S. McCain, for the appellant.

Feazel & Bishop, for the appellee.

⁸⁶ RIDDICK, J. On the fifth day of January, 1901, James J. Gibhart borrowed one hundred dollars from the Howard County Bank, and gave a promissory note therefor to the bank payable in sixty days with ten per cent interest.

On the sixth day of March, 1901, Gibhart borrowed an additional sum of one hundred and thirty dollars from the same bank, and gave a note therefor payable in sixty-five days with ten per cent interest.

⁸⁷ Both of these notes were signed by Gibhart and by H. N. Baker, Gibhart being the principal debtor and Baker his surety. When the notes became due, they were not paid. Afterward, in 1905, James H. Skillern, the receiver appointed to take charge of the assets of the bank, brought this action in the Howard circuit court against Gibhart and Baker to recover the amount due on the notes.

Gibhart had left the state, and was not served. Baker filed an answer, in which he alleged that he had signed the notes as surety to enable Gibhart to borrow money from the bank, and that after the notes became due he notified the bank in writing to forthwith commence suit on the notes against Gibhart, the principal debtor, that the bank failed to commence suit for more than thirty days after service of notice, and that under the statute he thereby became discharged from liability on the notes.

On the trial, Baker, the defendant, testified that after the notes became due he served notice on the cashier of the bank to bring suit, and produced a copy of the notice which he claimed to have served. The cashier testified for the bank that he had no recollection of having been served with written notice to bring suit, but that he would not say that notice had not been served.

The court, over the objection of the plaintiff, directed the jury to return a verdict for the defendant, which was done. The plaintiff appealed.

⁸⁸ The question presented by this appeal is whether the court was justified under the state of the evidence in directing the jury to return a verdict for the defendant. The plaintiffs had made a prima facie case by introducing promissory notes which the defendant and one Gibhart had executed to the bank. The defendant, Baker, admitted that he had signed these notes as surety to enable Gibhart, the principal in the note, to borrow money from the bank, and it is not claimed that the notes had been paid. But the defendant testified that after the notes became due he had served written notice on the cashier of the bank to bring suit on the notes, that the bank failed to bring suit, and he claims that he was released from liability by virtue of the statute which made it incumbent on the bank to bring suit within thirty days after receiving such notice. This plea of notice to the bank to bring suit was an affirmative defense set up by the defendant, and the burden was on him to prove it. The only evidence he offered was his own testimony. To rebut this the receiver of the bank introduced the cashier of the bank, upon whom plaintiff testified that he served the notice, and the cashier testified that he had no recollection that any written notice to bring suit on the notes had been served upon him; that he would not say that none was served, but that if any was served he did not remember it. This was all the evidence bearing on this point; and as the only witness for plaintiff ⁸⁹ testified that he could not say that notice was not served, though he did not remember it, the trial judge treated the evidence of the defendant as uncontradicted, and directed a verdict in his favor. But we are of the opinion that under the evidence this direction was improper. It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based as on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury: *Roseberry v. Nixon*, 58 Hun, 121, 11 N. Y. Supp. 523; *Wohlfahrt v.*

Beckert, 92 N. Y. 430, 44 Am. Rep. 406; Thomasson v. Groce, 42 Ala. 431; Talcott v. Meigs, 64 Conn. 55, 29 Atl. 131; Miller v. White River School Tp., 101 Ind. 503; 6 Ency. of Pl. & Pr. 696; Ruiz v. Renauld, 100 N. Y. 256, 3 N. E. 182; Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109.

In this case the witness was the defendant in the case. He was not only directly interested in the result, but there was the added circumstance that the party upon whom he testified that he served notice swore that he had no remembrance of any such service. If this witness told the truth, the fact that he had no recollection of the service of notice to which defendant testified was a circumstance from which the jury might have inferred that no service was in fact made, and that defendant was mistaken in so testifying. If we could go into a consideration of the weight to be attached to this evidence, we might agree with the trial judge that the judgment for defendant was right; but, as before stated, we are of the opinion that the matter was one for the jury to determine.

The evidence in this case shows that the cashier upon whom defendant claims to have served notice had entire charge of the business of the bank, the president being such in name only, and under such circumstances the service of notice on the cashier was service on the bank.

As the case must be reversed, we call attention to the fact that, as shown by the transcript, one of the notes sued on in this case was for one hundred dollars and interest, and it has been decided that the circuit court had no original jurisdiction to entertain an action on such note, even though joined with the other note of which the court had jurisdiction: Berry v. Linton, 1 Ark. 252; Martin v. Foreman, 18 Ark. 249; Gregory v. Williams, 24 Ark. 177; Humphrey v. McCauley, 55 Ark. 143, 17 S. W. 713.

Judgment reversed, and cause remanded for a new trial.

The Court may Instruct the Jury to return a verdict for either party, when it is plain that a contrary verdict would not be allowed to stand: Moore v. McKinney, 83 Me. 80, 23 Am. St. Rep. 753; Linkauf v. Lombard, 137 N. Y. 417, 33 Am. St. Rep. 743; Hite v. Metropolitan etc. Ry. Co., 130 Mo. 132, 51 Am. St. Rep. 555; McCormick etc. Machine Co., 7 S. Dak. 363, 58 Am. St. Rep. 839; Burke v. First Nat. Bank, 61 Neb. 20, 87 Am. St. Rep. 447; Burns v. Smith, 29 Ind. App. 181, 94 Am. St. Rep. 268; Marshall v. Gross Clothing Co., 184 Ill. 421, 75 Am. St. Rep. 181; Cherry v. Des Moines Leader, 114 Iowa, 298, 89 Am. St. Rep. 365. But this rule does not apply when there is a conflict

of testimony, unless that on one side amounts only to a scintilla: *Heh v. Consolidated Gas Co.*, 201 Pa. 443, 88 Am. St. Rep. 819; *Mayer v. Thompson-Hutchinson Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88.

It is not Proper for the Court to Direct a Verdict for the plaintiff where a passenger sues a railway company for the loss of her trunk, containing articles of baggage, if the defendant raises no issue as to her right to have the articles transported, and no fact is developed on her examination, except her interest, which affects her credibility, nor is her testimony impeached: *St. Louis etc. Ry. Co. v. Johnson*, 82 Ark. 365.

BRENNER v. JONESBORO, LAKE CITY AND EAST-ERN RAILROAD COMPANY.

[82 Ark. 128, 100 S. W. 893.]

CARRIERS—Expulsion of Passenger—Damages for Humiliation.—When a passenger voluntarily suffers or seeks his expulsion from a train in order to lay the foundation of a damage suit, he is not entitled to recover for his humiliation in being expelled. (p. 57.)

F. G. Taylor, for the appellant.

E. F. Brown, and W. J. Driver, for the appellee.

128 WOOD, J. Appellant endeavored to purchase a ticket from appellee's station agent at Manilla to Leachville, another station on appellee's road. The agent did not have the printed tickets, and did not have time to fill one out, so appellant through the negligence of appellee was unable to procure a ticket. The rules of the company require passengers without ticket to pay five ¹²⁹ cents per mile. The conductor, upon the failure of appellant to produce ticket, demanded of appellant the extra fare. Appellant refused to pay more than the regular fare for those having tickets. The conductor then ejected appellant from the train at a point that was not a regular stopping place or station. Appellee's conductor used no more force than was necessary to accomplish the expulsion. The expulsion was unattended with insults or indignities. The appellant, after testifying to the facts which caused the expulsion and the circumstances attending it, said that it was his purpose at the time the conductor refused to permit him to ride for twenty-five cents (the fare for those having tickets) to bring suit against the company. He said that he "was perfectly willing to get off the train, and that it was his intention to do

so, after the conductor refused to take the twenty-five cents fare. He was going to be put off, so that he might bring suit against the company for the benefit of the people who were members of the Drummers' Association," to which he belonged. The above are the facts developed by the pleadings and proof.

The court instructed the jury as follows:

"Gentlemen of the jury, the plaintiff is entitled to recover in this case his actual damages, and you will assess his damages at what you believe from the evidence will compensate him for his actual damages and nothing more.

"2. In assessing damages you cannot take into consideration any humiliation to plaintiff by reason of his wrongful ejection from the train."

Appellant objected and excepted to the ruling. The jury returned a verdict for twenty-five dollars. Motion for new trial, reserving exceptions, was overruled. Judgment was entered for the amount of the verdict, and this appeal was taken.

¹³⁰ The court was correct in not allowing the jury to consider the question of appellant's alleged humiliation in assessing the damages. Ordinarily, "the sense of wrong suffered and the feeling of humiliation and disgrace" resultant from an illegal expulsion from a train in the presence of passengers is a proper element in measuring the actual damages to the injured party: 6 Cyc. 566; *Wilson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146. But this doctrine can have no application to a case where the passenger voluntarily suffers or seeks the expulsion in order to lay the foundation for a damage suit. The maxim "*Volenti non fit injuria*" applies in such cases. Under the proof, it applies here. Appellant was not only willing to be expelled after the conductor refused to accept the fare he offered, but he actually desired the ejection, in order to enable him to bring suit. Humiliation is ¹³¹ incompatible with such mental status: *St. Louis etc. Ry. Co. v. Trimble*, 54 Ark. 354, 15 S. W. 899. See, also, *St. Louis Southwestern Ry. Co. v. Knight*, 77 Ark. 20, 88 S. W. 1035.

Judgment affirmed.

Damages for the Indignity and consequent injury to his feelings may be allowed a passenger for his wrongful eviction from a train: *McDonald v. Central R. R. Co.*, 72 N. J. L. 280, 111 Am. St. Rep. 672; *Kansas City etc. R. R. Co. v. Foster*, 134 Ala. 244, 92 Am. St. Rep. 25; *Mabry v. City Elec. Ry. Co.*, 116 Ga. 624, 94 Am. St. Rep. 141, and cases cited in the cross-reference note thereto.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. RENFROE.

[82 Ark. 143, 100 S. W. 889.]

CARRIERS—Proper Cars for Shipment of Fruit.—When a carrier accepts perishable fruit to ship to market, it is its duty to furnish cars especially adapted to the preservation thereof during transportation. (p. 58.)

CARRIERS—Duty to Ice Refrigerator-car.—When a carrier undertakes to transport fruit in a properly iced refrigerator-car, it is liable for a failure to comply with such undertaking, although it has an agreement with an independent contractor to furnish the car and the refrigeration therefor. (p. 59.)

CONNECTING CARRIERS—Presumption of Negligence.—The presumption that in case of damage to goods which have been shipped over connecting railway lines the delivering carrier caused the injury obtains only in the absence of any proof locating the negligence. (p. 60.)

Action by a shipper of fruit against the carrier for a loss occasioned by a failure to keep the car properly iced. From a judgment for the plaintiff the defendant appealed.

Oscar L. Miles, for the appellant.

Sam R. Chew, for the appellees.

148 WOOD, J. The contract of shipment, as evidenced by the bill of lading, was entered into between appellant and appellee. It was for through shipment over appellant's line and connecting carriers from Alma, Arkansas, to Kansas City, Missouri. Appellant having accepted the berries for through transportation, it was its duty to furnish cars suitable for the purpose. Strawberries were perishable goods, and appellant having undertaken to transport them to market, it was its duty to furnish cars especially adapted to the preservation of such goods during the time required for their transition from the place of shipment to the place of destination under the contract.

"If," says Mr. Hutchinson, "the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier, where he accepts the goods, to provide such cars for their carriage": Hutchinson on Carriers, 3d ed., secs. 505, 508; Beard ¹⁴⁰ v. Illinois Cent. Ry. Co., 79 Iowa,

518, 18 Am. St. Rep. 381, 44 N. W. 800, 7 L. R. A. 280; Chicago etc. R. R. Co. v. Davis, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382; St. Louis etc. Ry. Co. v. Marshall, 74 Ark. 597, 86 S. W. 502.

It is the contention of appellant that it discharged its duty to appellees when it furnished a refrigerator-car, and that the duty of icing the car, under the evidence, devolved upon the American Refrigerator Transit Company, the owner of the car. The contention is unsound, as shown in New York etc. R. Co. v. Cromwell, 98 Va. 227, 81 Am. St. Rep. 722, 35 S. E. 44, 49 L. R. A. 462. That was a case that involved the transportation of strawberries. The court said: "The California Fruit Transportation Company, for a consideration, furnished its cars to the plaintiff in error [the railway company.] These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another. The undertaking of the plaintiff in error [railway company] was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which it was carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employes were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator-car belonged to it."

It matters not in the case at bar that the refrigerator-car belonged to the American Refrigerator Transit Company, an independent contractor. Appellees had no contract with it to furnish cars or to ice them when furnished. Their contract was with appellant to furnish suitable cars; and the evidence was ample to support the verdict, that appellant not only undertook ¹⁵⁰ to furnish the car, but also to ice the same. Even if the law did not impose this upon appellant

as a duty, the proof shows that it undertook, for a valuable consideration, to furnish refrigeration as well as the car. The sum of fifty dollars was charged and paid for that service to appellant.

The evidence was sufficient to warrant the jury in finding that appellant negligently failed to perform this service, that it failed to carry out its contract to ice the car and thus to furnish a suitable car.

True, in the case of connecting carriers the presumption is that the delivering carrier caused the injury: *Kansas City S. Ry. Co. v. Embry*, 76 Ark. 589, 90 S. W. 15; *St. Louis etc. Ry. Co. v. Marshall*, 74 Ark. 597, 86 S. W. 502; *St. Louis etc. Ry. Co. v. Coolidge*, 73 Ark. 112, 108 Am. St. Rep. 21, 83 S. W. 333; *St. Louis S. W. Ry. Co. v. Birdwell*, 72 Ark. 502, 82 S. W. 835. But this presumption only obtains in the absence of proof locating the negligent carrier. Here the evidence warranted the jury in finding that appellant was negligent in failing to use ordinary care to see that the car was kept properly iced at Van Buren before it started for Kansas City.

Finding no error, the judgment is affirmed.

A Railway Company cannot escape liability for its failure to provide cars reasonably safe and fit for the transportation of perishable fruit by alleging that the cars used for the purpose of its own transit are the property of another who undertook to insure their fitness: *New York etc. R. R. Co. v. Cromwell*, 98 Va. 227, 81 Am. St. Rep. 722.

The Presumption of Negligence as between connecting carriers in a case of an injury to goods shipped over their lines is considered in the note to *Beede v. Wisconsin Cent. Ry. Co.*, 101 Am. St. Rep. 392.

CARL LEE v. ELLSBERRY.

[82 Ark. 209, 101 S. W. 407.]

DEED—Repugnant Clauses.—If the Granting Clause in a deed conveys the land in fee, a proviso in the habendum limiting the estate in certain contingencies to a life estate is repugnant to the granting clause and void. (p. 64.)

E. M. Carl Lee and N. W. Norton, for the appellants.

Andrews & Wood and Campbell & Stevenson, for the appellee.

210 **BATTLE, J.** This case involves the construction of so much of a deed executed by John T. Hamblett and wife to Georgena Ellsberry as is in the following words:

211 "Know all men by these presents, That we, J. T. Hamblett and Cordelia P. Hamblett, his wife, for and in consideration of the sum of one dollar to us in hand paid, and for the love and affection we have for our daughter, Georgena Ellsberry, we hereby convey, sell, give and bequeath to the said Georgena Ellsberry, and unto her heirs and assigns forever, the following lands lying and being situate in the county of Woodruff and State of Arkansas, towit: Lots numbered twelve (12), thirteen, (13) and fourteen (14) in block number fourteen (14) in the town of Augusta, to have and to hold the same unto the said Georgena Ellsberry and unto her heirs and assigns forever, with all the appurtenances thereto belonging. Provided, however, that should the said Georgena Ellsberry die without issue and before her husband, Wm. M. Ellsberry, then the property herein conveyed is to revert unto the said Wm. M. Ellsberry."

The granting clause of the deed conveys the lands described to the grantee in fee simple. The habendum defines the estate the grantee is to take to be the fee simple, with a proviso limiting the estate in certain contingencies to a life estate. The proviso or condition is repugnant to the granting clause. Which prevails?

In *Maker v. Lazell*, 83 Me. 562, 23 Am. St. Rep. 562, 22 Atl. 474, the court said: "There is one rule pertaining to the construction of deeds, as ancient, general and rigorous as any other. It is the rule that a grantor cannot destroy his own grant, however much he may modify it or load it with conditions—the rule that, having once granted an estate in his deed, no subsequent clause, even in the same deed, can operate to nullify it: 2 Bacon's Abridgment, 665; Shepherd's Touchstone, 79, 102. We do not find that this rule has ever been disregarded, or even seriously questioned, by courts. We find it often stated, approved, and sometimes made a rule of decision. In *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sr. 74, Lord Chancellor Hardwicke, 'in whose judgment equity shone resplendent,' declared that the courts either of law or equity should not adopt such a construction of an instrument of devise as would defeat the interests given. In *Cholmondeley v. Clinton*, 2 Jac. & W. 84, which was a case most elaborately argued and considered,

it was said by the court that where a limitation in a deed is perfect and complete, it cannot be controlled by intention collected ²¹² from other parts of the same deed." To support this rule of construction, the court cites and comments upon the following cases: *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321; *Ackerman v. Vreeland*, 14 N. J. Eq. 23; *Wilder v. Davenport's Estate*, 58 Vt. 642, 5 Atl. 753; *Cutler v. Tufts*, 3 Pick. 272; *Wilcoxson v. Sprague*, 51 Cal. 640; *Green Bay etc. Canal Co. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382.

In *Green Bay etc. Canal Co. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382, Mr. Justice Lyon, delivering the opinion of the court, said: "Which of these two conflicting clauses in the deed of 1873 should prevail? This question must be determined by rules of law . . . governing the construction of deeds. One of these rules is that a deed is always construed most strongly against the grantor: 4 Greenleaf's *Cruise on Real Property*, 352, tit. 32, c. 20, sec. 13. Another is that where there are two clauses in a deed, and the latter is contradictory to the former, the former shall stand. This is an application of the ancient rule or maxim that 'the first deed and the last will shall operate.' . . . If the subsequent clause in the deed of 1873 is regarded as a habendum, then we have this rule laid down by Cruise in the title above cited (chapter 21, sections 75, 76): 'Where the habendum is repugnant and contrary to the premises, it is void, and the grantee will take the estate given in the premises. This is a consequence of the rule already stated, that deeds shall be construed most strongly against the grantor; therefore, he shall not be allowed to contradict or retract, by any subsequent words, the gift or grant made in the premises. Thus, if lands are given in the premises of a deed to A and his heirs, habendum to A for life, the habendum is void, because it is utterly repugnant to and irreconcilable with the premises.' "

In *Whetstone v. Hunt*, 78 Ark. 230, 93 S. W. 979, this court held that where the granting clause and the habendum of a deed conflict the habendum yields and the granting clause prevails. In the case before us the proviso or condition performs the office of a habendum, and there is no reason why it should have any greater force.

In *Scull v. Vaugine*, 15 Ark. 695: "Upon division of property among heirs and settlement of the widow's claims upon

the estate, the heirs executed a deed by which they conveyed to A a slave with the proviso that, 'in ²¹³ the event of his death before he came to the age of twenty-one years, or has heirs of his own, then to revert and become the joint property of the grantors,' the court held that the conveyance created an absolute estate in the grantee, that the proviso was repugnant to the deed and void."

In *Green Bay etc. Canal Co. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382, the owner of land conveyed it by deed, quitclaiming in the granting clause all his right, title and interest. By a subsequent clause it was declared that the interest and title intended to be conveyed was only that acquired by him through a certain deed, conveying an undivided half. It was held that the premises or granting clause controlled the other clause which conflicted with it, and that the grantor's whole interest passed.

In *Case v. Dwire*, 60 Iowa, 442, 15 N. W. 265, Burwell conveyed land to Case "to have and to hold the same unto her, the said Case, as her own and indefeasible estate, to be owned, controlled, managed, and, if desired, sold and conveyed by her or those who may act for her as her legal representatives or guardians during her lifetime," upon condition, however, that "whatever part or parcel of said premises may be owned or held by the said Case at the time of her decease, or of which she may die seised, or in which she may at that time have any right, title, or interest, shall revert to, vest in, and again become the absolute and indefeasible property of the grantor, or, in case of his death, to his lawful heirs, to the absolute exclusion and inhibition of all other persons or heirs." The court held that Case took an absolute title in fee, and that the condition, being repugnant to the fee, was void, and that, upon the death of Case, the land went to her heirs and not to Burwell, who survived her: See to the same effect, *Maker v. Lazell*, 83 Me. 562, 23 Am. St. Rep. 795, 22 Atl. 474; *Pike v. Monroe*, 36 Me. 309, 58 Am. Dec. 751; 2 Devlin on Deeds, 2d ed., secs. 838, 960; 1 Jones on the Law of Real Property in Conveyances, secs. 664, 670, and cases cited.

The intent of the testator does not always govern the construction of wills. There are rules of law which control their construction. In *Bernstein v. Bramble*, 81 Ark. 480, 99 S. W. 682, 8 N. S. 1028, the will in question contained these

words: "All the rest, residue and remainder of my estate, real as well as personal, and wheresoever situated, I hereby devise, give and bequeath to my beloved ²¹⁴ wife, Minna Elle, to have and to hold the same in fee simple forever. But in case of the death of my beloved wife, it is my will that all the estate then remaining and not disposed of by her by a last will or other writing shall pass to my said brother, Moritz Elle, and my sister, Henrietta Bernstein, or their heirs in equal parts." This court held that the property in controversy was devised to Minna Elle in fee simple, "with an absolute power of disposition either by sale or devise clearly and unmistakably implied," and that the latter clause being repugnant to the first was void: See authorities cited, and *Ide v. Ide*, 5 Mass. 500; *Jackson v. Bull*, 10 Johns. 19; and *Jackson v. DeLancy*, 13 Johns. 537, 7 Am. Dec. 403.

The conveyance in fee simple carries with it the power to dispose of the estate by deed or will. The power of alienation is an inseparable incident of such an estate. So the deed in question conveyed to Mrs. Ellsberry the estate in fee simple with the power to dispose of it. The limitation of it to a life estate was repugnant to the granting clause, and was void.

Reversed and remanded for proceedings consistent with this opinion.

For Authorities upon the Decision in the principal case, see the recent note to Wilkins v. Norman, 111 Am. St. Rep. 770, on repugnant clauses in deeds.

BAXLEY v. LASTER.

[82 Ark. 236, 101 S. W. 755.]

EXEMPTIONS—Filing Schedule.—Under no statute or law of Arkansas is property acquired since the filing of a schedule of exemptions relieved from seizure under any process before the filing of a schedule claiming the same as exempt. (p. 68.)

EXEMPTIONS—Restraining Garnishment.—The repeated prosecution of writs of garnishment to reach wages alleged to be exempt will not be enjoined on the ground that the purpose of the creditor is to annoy and harass the complainant and tie up his wages. His remedy, if any, is at law for a malicious abuse of process. (p. 69.)

Carmichael, Brooks & Powers, for the appellant.

W. H. Pemberton, for the appellee.

237 BATTLE, J. A. J. Laster brought suit against W. D. Baxley and others to enjoin them from prosecuting against him certain proceedings by garnishment. The defendants have substantially set out the allegations of his complaint as follows:

“The complaint states that the appellee is a resident of the state of Arkansas, a married man, and the head of a family, and that he was working for Leon Dreyfus; that W. B. Baxley had obtained a judgment against him for the sum of eighty-four dollars and seventy cents and costs, and that the said Baxley on the twenty-second day of March, 1905, procured a garnishment on Leon Dreyfus; that said Dreyfus answered that he did not owe anything to the appellee, and the garnishee was discharged. That on the eleventh day of April, 1905, said Baxley procured another garnishment against the said Leon Dreyfus, and that the appellee, in order to have his wages released, was compelled to schedule; that he did schedule, and the said Dreyfus was discharged, and the appellee’s wages released, but that the prosecution of said writ was vexatious and annoying to the appellee. That on the twenty-sixth day of May, 1905, the said Baxley caused another writ of garnishment to be issued against Leon Dreyfus returnable on the third day of June, 1905, which last date was subsequent to the filing of the complaint **238** herein, which was on the thirtieth day of May, 1905. Complaint then alleges that appellee is a married man, the head of a family of six children, the eldest being a daughter about twenty-one years of age, and the youngest being a daughter of about nine years of age, and that the appellee provides and takes care of all of said six children and their mother; that all the property he owns, including the debt due him from Leon Dreyfus, does not exceed in value the sum of two hundred and thirty-seven dollars; that the only purpose and object of the said appellee in issuing said writs of garnishment was to annoy, vex and harass appellee, and to tie up his wages, which are his only means of support, to cause him to lose time and incur expenses in attending court, in issuing notices and filing schedules and claims of exempt property; that appellants knew, at the time of issuing said garnishment, that appellee’s wages were, under the law, exempt from legal process; that he was put to the expense of forty-five dollars for legal services, which he has not been

able to pay, and court costs, and that he ought to be relieved of such persecution. He prayed that all the appellants be enjoined and restrained from further garnishment, and that, upon a final hearing, the injunction be made permanent, and asked for damages in the sum of one hundred dollars, and for costs, and for all other and further relief."

"The appellants filed the following demurrer to the complaint: 1. Because the complaint does not state facts sufficient to constitute a cause of action; 2. Because the plaintiff has a full, complete and adequate remedy at law; 3. Because this court has not the power to hear and determine this cause, and is therefore without jurisdiction; 4. Because the complaint does not state facts sufficient to entitle plaintiff to the relief sought."

"The court, after a full hearing, overruled the demurrer, and the appellants having signified their intention of standing on the demurrer and refusing to plead further, the court perpetually enjoined and restrained the further prosecution of the garnishment suits mentioned and described in the complaint herein, and now pending in the court of A. H. Stebbins, and further ordered and adjudged that the said appellants, each and all of them, their ²³⁹ agents, be perpetually enjoined and restrained from the institution and prosecution of other and further garnishment suits against the said appellee, A. J. Laster, upon said judgment, in the court of A. H. Stebbins, until such time as this court, upon proper showing made to it, shall permit the institution and prosecution of such other and further suits, and that the appellant pay all costs for which execution might issue in form, as upon a judgment at law, and the appellants prayed an appeal to the supreme court from the judgment and decree herein, which was granted."

The statutes of this state provide as follows:

Section 3694 of Kirby's Digest, under the law of garnishment is as follows: "In all cases where any plaintiff may begin an action in any court of record, or before any justice of the peace, or may have obtained a judgment before any of such courts, and such plaintiff shall have reason to believe that any other person is indebted to the defendant, or has in his hands or possession goods and chattels, moneys, credits, and effects belonging to such defendant, such plaintiff may sue out a writ of garnishment, setting forth such

claim, demand or judgment, and commanding the officer charged with the execution thereof to summon the person therein named, as garnishee, to appear at the return day of such writ and answer what goods, chattels, moneys, credits and effects he may have in his hands or possession belonging to such defendant, to satisfy said judgment, and answer such further interrogatories as may be exhibited against him; provided, if the garnishment be issued before the judgment, the plaintiff shall give bond," etc.

Section 3701 provides: "If the issue be found for the garnishee, he shall be discharged without further proceedings; but if the issue be found for the plaintiff, judgment shall be entered for the amount found due from the garnishee to the defendant in the original judgment, or so much thereof as will be sufficient to satisfy the plaintiff's judgment, together with costs."

Section 3904 of Kirby's Digest provides: "The personal property of any resident of this state, who is married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of five hundred dollars, in addition to his or her wearing apparel, and that of his or her family, shall be exempt from ²⁴⁰ seizure on attachment or sale on execution or other process from any court, on debt by contract."

And section 3905 of Kirby's Digest provides: "The time wages of all laborers and mechanics, not exceeding their wages for sixty days, shall hereafter be exempt from seizure by garnishment or other legal process. Provided, the defendant in any case shall file with the court from which such process shall issue a sworn statement that said sixty days' wages claimed to be exempt is less than the amount exempt to him under the constitution of the state, and that he does not own sufficient other personal property which, together with the said sixty days' wages, would exceed in amount the limits of said constitutional exemption."

Section 3906 of Kirby's Digest provides: "Whenever any resident of this state shall, upon the issue against him, for the collection of any debt by contract, of any execution or other process, of any attachment except specific attachment, against his property, desire to claim any of the exemptions provided for in article 9 of the constitution of this state, he shall prepare a schedule, verified by affidavit, of all his prop-

erty, including moneys, rights, credits and choses in action held by himself or others for him and, specifying the particular property which he claims as exempt under the provisions of said article, and, after giving five days' notice in writing to the opposite party, his agent or attorney, shall file the same with the justice or clerk issuing such execution or other process or attachment, and the said justice or clerk shall thereupon issue a supersedeas staying any sale or further proceeding under such execution, or process, or attachment, against the property in such schedule described, and claimed as exempted, and by returning the property to the defendant, and no alias execution shall be levied on property relieved from process by claim of exemption until after one year from the date of the filing of the schedule of exemptions."

The mode of claiming the exemptions allowed by law is by filing a schedule as provided by statute, and this mode is exclusive of all others. Until this is done, replevin will not lie for the exempted property. An officer cannot be treated as a trespasser, and "subjected to damages and the costs of an action, merely because he has seized property which may turn out to be ²⁴¹ exempt, for, until the schedule is filed, he has no certain means of knowing what part will be claimed, or whether any claim will be made." Neither can a bill in equity be allowed to restrain the sale of chattels under execution unless it shows that the plaintiff in such bill has no other means of stopping the sale, and that by such sale irreparable damage will result to him: *Settles v. Bond*, 49 Ark. 114, 4 S. W. 286; *Chambers v. Perry*, 47 Ark. 400, 1 S. W. 700; *Driggs Bank v. Norwood*, 49 Ark. 136, 4 Am. St. Rep. 30, 4 S. W. 448; *Weller v. Moore*, 50 Ark. 253, 7 S. W. 130; *Scanlan v. Guiling*, 63 Ark. 540, 39 S. W. 713.

The statute provides that no alias execution shall be levied on property relieved from process by claim of exemption until one year from the date of the filing of the schedule of exemption; and that "if the debtor has other property than that claimed in any former schedule the officer shall levy upon the same, and if the debtor desires to claim further exemption he shall include in any schedule all his property": *Kirby's Digest*, secs. 3906, 3907. Under no statute or law of this state is property acquired since the filing of a schedule relieved from seizure under any process before the filing of

a schedule claiming the same as exempt: *Weller v. Moore*, 50 Ark. 253, 7 S. W. 130.

The complaint in this case shows that appellee was in the employment of Leon Dreyfus, serving for wages; and at the issue of each writ of garnishment additional wages had been earned. These additional wages were lawfully subject to garnishment.

To sustain the decree of the court in this suit appellee cites the case of *Sevier v. Union Pacific R. Co.*, 68 Neb. 91, 110 Am. St. Rep. 393, 93 N. W. 943, 61 L. R. A. 319. That was a Nebraska case. In that state it has been held that a sale of personal property which is exempt from execution may be restrained at the suit of the judgment debtor. But that is not the law of this state, and personal property does not become exempt until it is selected by schedule filed according to the statute. The ruling of the Nebraska case is contrary to the weight of authority in other states: *Parsons v. Hartman*, 25 Or. 547, 42 Am. St. Rep. 803, 37 Pac. 61, 30 L. R. A. 98; *Baxter v. Baxter*, 77 N. C. 118; 1 High on Injunctions, 4th ed., sec. 122.

But appellee alleged in his complaint that "the only purpose and object the appellants had in issuing said garnishment writs was simply to annoy, vex and harass him, and to tie up his wages, ²⁴² which are his only means of support; to cause him to lose time and incur expenses in attending court and issuing notices and filing schedules and claims of exempt property, and in making defenses to said suits and to endanger his occupation." If they were using the writs of garnishment for a lawful purpose and in the manner prescribed by statute, he had no right to complain. But if he employed process, legally and properly issued, wrongfully and unlawfully for a purpose which by law it was not intended to effect, he was guilty of a malicious abuse of process, and would be liable in damages for the abuse: *Granger v. Hill*, 33 Eng. Com. L. 328; *Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993; 1 Cooley on Torts, 3d ed., p. 354; 19 Am. & Eng. Ency. of Law, 2d ed., 630; 1 Jaggard on Torts, p. 632; 1 Kinkead on Torts, sec. 233.

The chancery court, by the decree in this case, "ordered and adjudged that the appellants, each and all of them, and their agents be perpetually enjoined and restrained from the in-

stitution and prosecution of other and further garnishment suits against the appellee'' upon the judgment against him without permission of the court. This is a violation of the statute allowing the issue of writs of garnishment.

Decree reversed and cause remanded with directions to the court to sustain the demurrer to appellee's complaint.

Injunctions against the execution sale of exempt property are discussed in the note to *Florida Packing etc. Co. v. Carney*, 111 Am. St. Rep. 101.

The Malicious Prosecution of civil actions is the subject of a note to *McCormick Harvesting etc. Co. v. Willan*, 93 Am. St. Rep. 454.

WADLY v. LEGGITT.

[82 Ark. 262, 101 S. W. 720.]

EJECTMENT.—Proof of Title in a Third Person will defeat an action of ejectment. (p. 72.)

EJECTMENT—After-acquired Title—Res Judicata.—The fact that a losing defendant in ejectment failed to plead or prove title in a third person as a defense does not bar him, after the rendition of judgment, from acquiring such title and bringing suit to test its validity. (p. 72.)

APPEAL—Bringing Up Evidence.—A judgment will not be affirmed because the bill of exceptions fails to show affirmatively that it contains all the evidence, if it contains enough to show affirmatively that the court's finding was erroneous. (p. 73.)

W. S. Luna and Johnson & Huddleson, for the appellant.

J. D. Block and F. H. Sullivan, for the appellee.

264 McCULLOCH, J. This is an action in ejectment instituted in the circuit court of Greene county by appellant against appellee to recover a tract of land in that county, and the cause was tried by the court sitting as a jury.

The parties claimed title from a common source. The land in controversy was formerly owned by one Thomas Tolbert, who died intestate, and both parties claim title under conveyances from his heirs. The plaintiff, Mrs. Wadly, alleges that the Tolbert heirs conveyed the land to one Miller, but that the deed was lost, and the record thereof had been destroyed by fire, with all the other records of Greene county; that Miller died owning the land, and that she purchased from his heirs. Appellee denied that the Tolbert heirs ever

conveyed to Miller, and alleged that they conveyed to his grantor, Rowland, but appellant introduced testimony tending to establish the fact that said heirs conveyed the land to Miller before the date of their conveyance to Rowland, and that Rowland had knowledge of the previous conveyance to Miller. Appellee also pleaded adverse possession for seven years before the commencement of this action, and also pleaded in bar of appellant's right of action a decree of the chancery court of Greene county in favor of appellee's grantor, Rowland, rendered in a suit brought by Rowland against appellant to quiet his title to the land.

The record in the Rowland suit was introduced in evidence, and it appears therefrom that the chancery court at the November term, 1899, rendered a decree in favor of Mrs. Wadly, that Rowland appealed to this court, that this court on March 7, 1903, reversed the decree of the chancellor with directions to enter a decree for the appellant therein in accordance with the opinion of the court (*Rowland v. Wadly*, 71 Ark. 273, 72 S. W. 994), and that on November 3, 1903, the chancery court, pursuant to the mandate of this court, entered a final decree in favor of Rowland awarding the lands to him.

Appellant claimed title, as above stated, under deeds from the Miller heirs, and it was admitted by appellee in the trial below that said deeds (two of them) were executed on October 15, 1903, by the Miller heirs to appellant.

²⁶⁵ The court, without making a finding upon the other issues in the case, found from the evidence adduced that the issues in the case were adjudicated in the former suit of *Rowland v. Wadly* in favor of Rowland, and that appellant's right of action was barred by that adjudication. Judgment was entered accordingly.

The only question presented, therefore, by this appeal is whether the evidence sustains the finding of the court on that issue, as no other issue was passed upon by the court.

It will be seen from the foregoing recital that the appellant, Mrs. Wadly, acquired the alleged Miller title, under which she now claims, subsequent to the adjudication in the Rowland suit in chancery. That suit was decided by this court in favor of Rowland in March, 1903, the mandate of the court was filed in chancery court and decree thereon entered in November, 1903, and Mrs. Wadly acquired the Miller title on October 15, 1903.

It is plain, therefore, that the title under which Mrs. Wadly now claims was not, and could not have been, adjudicated in that suit. In that suit she claimed an entirely different chain of title. She claimed title under a conveyance to her ancestor executed by the widow of Thomas Tolbert. That chain of title was decided against her, but the Miller title was not adjudicated, and could not have been, as the Miller heirs, who then held that title, were not parties to the case. Nothing prevented the Miller heirs from instituting an action against appellee or Rowland to test the validity of their alleged title; and, as appellant purchased from the Miller heirs after the decree in the Rowland suit, she succeeded to all the rights of the Millers, including the right to sue to establish the validity of the title, notwithstanding the previous adjudication.

It is true, as urged by appellee, that the outstanding Miller title could have been pleaded in the Rowland suit, and proof of it would have defeated Rowland's right to recover: *Dawson v. Parham*, 47 Ark. 215, 1 S. W. 72; *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. 102; *St. Louis Refrigerator etc. Gutter Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852; *Carpenter v. Smith*, 76 Ark. 447, 88 S. W. 976.

But appellant's failure to plead the outstanding title of Miller did not bar her right, when she acquired that title subsequently ²⁶⁸ to the former adjudication, to plead it in a subsequent action brought by her to test its validity. By the subsequent acquisition of the Miller title she stands in precisely the same attitude in which the Miller heirs stood. It may be that Miller never purchased from the Tolbert heirs, or that the Miller title is barred by limitation; but the proof is conflicting on these issues, and the court made no finding upon them, and we cannot treat them as settled. As the trial court came to an erroneous conclusion on the issue as to the former adjudication, appellant is entitled to the decision of a trial jury or court on the other disputed questions.

When we speak of the acquisition by appellant of the Miller title after the former adjudication, we mean after the judgment of this court settling the title and directing the chancery court to enter a decree in accordance with the opinion. The adjudication dates from that time, and it became the duty of the chancery court to enter a decree in accordance with the mandate, which was done.

The issues in that suit were settled by the judgment of this court, and it was not incumbent on appellant, the defendant in that suit, to plead any title subsequently acquired. She was not, therefore, barred from pleading such after-acquired title in another action: *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; *University of North Carolina v. Maultsby*, 55 N. C. 241; *Woodbridge v. Banning*, 14 Ohio St. 328; *McKissick v. McKissick*, 6 Humph. (Tenn.) 75.

There is some confusion and conflict in the evidence as to the names of the Tolbert heirs from whom Miller is alleged to have purchased, and there was evidence introduced by appellee tending to show that there was one or more of the Tolbert children besides those mentioned in appellant's pleadings and proof; but we think there was enough proof, if accepted as true, to sustain appellant's contention of the purchase by Miller from all of the Tolbert heirs. Appellee admitted in his answer that there were only four of the Tolbert heirs, as alleged in the complaint, and that one of them, Mary Tolbert, died intestate without issue, and appellant's evidence tended to establish the fact that Miller thereafter purchased from the other three.

Counsel for appellee also contend that the judgment should be affirmed because the bill of exceptions fails to show affirmatively ²⁶⁷ that it contained all the testimony. It does, however, contain a complete transcript of the record pleaded in bar, and also shows that appellant acquired the title now asserted after that adjudication. This is sufficient to show affirmatively that the court's finding was erroneous.

For this error the judgment is reversed, and the cause remanded for a new trial.

An Action of Ejectment may be defeated by proof of title in a third person: *Doe v. Fields*, 7 Jones, 37, 75 Am. Dec. 450; *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683; *Wagener v. Parrott*, 51 S. C. 489, 64 Am. St. Rep. 695.

Title Acquired After Issue is Joined, not put in issue by a supplemental pleading, is not affected by any judgment which may be rendered in the action: *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186.

The Recovery of the Plaintiff in Ejectment may be defeated by the defendant showing title in himself acquired after the commencement of the suit: *McCauley v. Jones*, 34 Mont. 375, 115 Am. St. Rep. 538.

KNIGHT v. CRESWELL.

[82 Ark. 330, 101 S. W. 754.]

JUDGMENT.—Equity will not Restrain the Enforcement of a void judgment where the remedy at law is complete. And if the invalidity of a judgment of a justice's court appears upon its face, the remedy against it is complete by certiorari; while if its invalidity does not appear on its face, the justice who rendered it has power to correct it, and that remedy is plain. (p. 74.)

T. E. Mearss, for the appellant.

George W. Norman, for the appellee.

³³⁰ McCULLOCH, J. This is a suit in chancery to enjoin the enforcement of the judgment of a justice of the peace in an ³³¹ action of replevin. The ground set forth in the complaint upon which equitable relief against the judgment is sought is that it was rendered without notice, that no summons was issued, and that the plaintiff (who was defendant in said judgment) did not appear.

The judgment of the justice of the peace was, if the allegations of the complaint be taken as true, and the defect appeared upon the face of the judgment, absolutely void, and the remedy against it is complete by certiorari. If the invalidity of the judgment did not appear on its face, then the justice of the peace who rendered it had the power to correct it, and that remedy at law was plain: *Gates v. Bennett*, 33 Ark. 475; *Levy v. Ferguson Lbr. Co.*, 51 Ark. 317, 11 S. W. 284. An appeal will lie to the circuit court from a refusal of the justice to amend his record. Equity will not restrain the attempted enforcement of a void judgment where the remedy at law is complete: *Shaul v. Duprey*, 48 Ark. 331, 3 S. W. 366; *Wingfield v. McLure*, 48 Ark. 510, 3 S. W. 439.

Reversed and remanded with directions to dismiss the complaint.

On Relief in Equity Against Judgments, see the note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 218.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY v. PEARCE.

[82 Ark. 353, 101 S. W. 760.]

CARRIER—Notice of Injury as Condition Precedent to Recovery.—A condition in a bill of lading for the shipment of livestock, made in consideration of a reduced rate, that, as a condition precedent to a recovery of damages for injuries to the animals, the shipper must give notice before they are mingled with other stock and within one day after their delivery at their destination, is reasonable and binding, and places the burden on the shipper of showing that he gave such notice. (p. 76.)

CONNECTING CARRIERS—Presumption of Negligence.—In an action against an initial carrier of two or more connecting lines, the burden of proof is upon the plaintiff to show that the damages occurred on its line; but in a suit against the last or delivering carrier, the burden is upon it to show that the damage was not done on its line. (p. 77.)

CARRIER—Delay in Shipment—Market Reports as Evidence of Value.—Standard market reports of the price of livestock during the period of a delay in the shipment of livestock are admissible in evidence in an action against the carrier for losses occasioned to the shipper by such delay. (p. 77.)

CARRIER—Contract for Prompt Delivery Implied.—Where a contract for the transportation of livestock does not expressly require the carrier to make a delivery in time for any special market, the law implies a contract to deliver with reasonable promptness and without unnecessary delay. (p. 78.)

CARRIER—Contracts Restricting the Liability of a carrier, or releasing it from a liability already accrued to the shipper, must be reasonable and based upon a consideration. (p. 78.)

CARRIER—Release of Liability.—If a Carrier is already liable to a shipper for a failure to furnish cars, it has no right to require a release of this liability before according to him the privilege of shipping upon terms the same as those given to other shippers who assert no claim for damages. (p. 78.)

CARRIERS.—A Contract Limiting the Liability of a carrier is valid when not forced upon the shipper. Therefore, he cannot evade such a contract by proving that he signed it without reading, and that the agent did not inform him of another rate under a contract of unrestricted liability, unless upon demand the agent refused to give such information or to accept the shipment under an unrestricted liability. (p. 79.)

L. F. Parker and B. R. Davidson, for the appellant.

J. A. Rice, for the appellee.

356 McCULLOCH, J. This is an action instituted by the plaintiffs, Bart Pearce and J. C. Puckett, to recover damages to livestock shipped over appellant's road to St. Louis. The complaint contains two paragraphs, setting forth two

separate causes of action: One for damages to a carload of hogs shipped on September 24, 1904, from Gravette, Arkansas, caused by negligence of the company in failing to transport the carload of hogs with due diligence; and the other for damages to a lot of cattle and hogs shipped November 16, 1904, from Centerton, Arkansas, caused by negligence of the company in failing to furnish cars promptly and in failing to transport the carloads of cattle and hogs with due diligence after they were shipped.

The shipments were made under a special contract restricting the liability of the carrier in consideration of reduced rates, and the several contracts or bills of lading are exhibited with the complaint. The damages are alleged to have been sustained by reason of some of the hogs dying and the shrinkage in weights and depreciation in the market prices during the delays. A verdict was returned in favor of the plaintiffs, and the defendant appealed, assigning various alleged errors of the court.

1. The contract contained the following, among other, clauses: "That, as a condition precedent to a recovery for any damages for delay, loss or injury to livestock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims."

The evidence fails to show that the notice of damage was given within the time named, and the defendant asked instructions ³⁵⁷ to the effect that if the jury found that the notice was not given within the stipulated time there would be no recovery for shrinkage in weight or price of the stock. The court refused to give the instruction, and no instructions on this subject were given.

This provision of the contract is reasonable and binding, and the instructions should have been given: *Kansas etc. R. R. Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515; *St. Louis etc. Ry.*

Co. v. Hurst, 67 Ark. 407, 55 S. W. 215; 1 Hutchinson on Carriers, sec. 442, and cases cited.

The stock was unloaded and sold within the time stipulated for the giving of the notice, and it imposed no unreasonable terms upon the plaintiffs in requiring them to give notice within that time of their intention to claim damages.

The giving of the notice within the time named was, according to the stipulation, a condition precedent to right of recovery, and the burden of proof was therefore on the plaintiffs to show that they had given the notice. Inasmuch as this was not shown, the evidence was not sufficient to sustain the verdict.

2. The defendant requested the court to give the following instruction, which was refused: "7. I charge you that where stock is shipped over two or more connecting lines, and the stock is found damaged at destination, the presumption is that the stock, if damaged at all by the carrier, was damaged by the last line handling the same, and in order to recover in this action it would devolve upon the plaintiffs to show that the defendant company was guilty of some negligent act or acts which caused the death of the hogs."

The instruction was properly refused. In an action against the initial carrier of two or more connecting carriers the burden of proof is upon the plaintiff to show that the damage occurred on that line, whereas, if the suit be against the last or delivering carrier, the burden is upon it to show that the damage was not done on its line: St. Louis etc. Ry. Co. v. Birdwell, 72 Ark. 502, 82 S. W. 835; St. Louis etc. Ry. Co. v. Coolidge, 73 Ark. 112, 108 Am. St. Rep. 21, 83 S. W. 33.

But it is not correct to say that in a suit against the initial carrier there is any presumption as to the line on which the damage occurred.

²⁵⁸ The court told the jury in this case that the burden was on the plaintiff to show that the damage was caused by defendant's negligence. This was sufficient.

3. One of the plaintiffs was allowed, over defendant's objection, to testify from the market reports printed in a trade journal printed and published where the stock were sold as to the market price of hogs and cattle during the period of delay in the shipment. Standard price lists and market reports, shown to be in general circulation and relied on by the commercial world and by those engaged in the trade, are admissible as evidence of market values of articles of trade:

17 Cyc. 425; 3 Wigmore on Evidence, sec. 1704; *Sisson v. Cleveland etc. Ry. Co.*, 14 Mich. 489, 90 Am. Dec. 252; *Cleveland etc. R. Co. v. Perkins*, 17 Mich. 296; *Nash v. Classen*, 163 Ill. 409; *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202; *Harrison v. Glover*, 72 N. Y. 451; *Fairly v. Smith*, 87 N. C. 367, 42 Am. Rep. 522; *Washington Ice Co. v. Webster*, 68 Me. 449; *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414.

It is argued that this testimony was inadmissible because the contract of shipment did not require the carrier to deliver the stock in time for any special market. This is true, but the law implies a contract to deliver with reasonable promptness and without unnecessary delay: *St. Louis etc. Ry. Co. v. Coolidge*, 73 Ark. 112, 108 Am. St. Rep. 21, 83 S. W. 33; 2 *Hutchinson on Carriers*, secs. 651, 662.

4. The contract further stipulated that the shippers waived all claim of damages which had accrued to them by reason of delays, prior to the signing of the contract, in furnishing cars, and it is insisted that this clause of the contract is binding, and precludes any recovery for such delay.

Contracts of carriage restricting the liability of the carrier, or releasing claim for liability already accrued to the shipper must be reasonable and based upon a consideration: *Little Rock etc. Ry. Co. v. Cravens*, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803, 18 L. R. A. 527; *St. Louis etc. Ry. Co. v. Coolidge*, 73 Ark. 112, 108 Am. St. Rep. 21, 83 S. W. 33.

The contract in this case was based upon a reduced rate, but the evidence shows that it was a printed form of contract given to all shippers alike who desired the reduced rate upon the stipulated terms. It is unreasonable to require a shipper to release the carrier from a liability already accrued on account of negligence or failure to perform a duty owing to shippers. If the ³⁵⁹ defendant was liable to the plaintiffs for failure to furnish cars, then it had no right to require a release of his liability before according to them the privilege of shipping upon terms the same as those given to other shippers who asserted no claim for damages. The claim for damages already accrued was a distinct matter, and was not a subject to be included in a contract for shipment subsequently entered into, unless based on a separate consideration for the release of liability.

Other questions are raised in the record, but as the case must be reversed on account of the error indicated it is unnecessary to discuss other questions. It should be added,

however, that the validity of the contract of shipment was not assailed in the pleadings. On the contrary, the plaintiffs exhibited the contract with the complaint as a basis of their right to recover in this action, and they introduced no testimony tending to show that they were denied the opportunity to ship their stock under a contract for unrestricted liability of the carrier. The contract was therefore valid, and binding upon the shipper except in the particular already named. It was improper to permit the plaintiff to testify that they signed the contract without reading it, and that the agent did not inform them that there was another rate under a contract of unrestricted liability. The agent was not bound to so inform them unless requested to do so, as information was obtainable from other sources provided by law; and unless the agent refused, upon demand, to accept the shipment at another rate under a contract for unrestricted liability, there is no reason for holding the contract to be void, as this court has held that the contract is valid and binding where it is not forced upon the shipper: *St. Louis etc. Ry. Co. v. Lesser*, 46 Ark. 236; *St. Louis etc. Ry. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134.

Reversed and remanded.

The Limitation of Carriers' Liability in bills of lading is discussed at length in the note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74. Carriers of livestock may, by special contract, so limit their liability for loss or damage that they will be liable only in the event that they are guilty of gross negligence: *Atlantic Coast Line R. R. Co. v. Dexter*, 50 Fla. 180, 111 Am. St. Rep. 116; *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322, 110 Am. St. Rep. 170; *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955.

The Liability of an Initial Carrier for the torts and negligence of connecting lines is discussed in the note to *Pennsylvania Co. v. Loftis*, 106 Am. St. Rep. 604; and the burden of proof as between connecting carriers to show who is at fault for a loss or injury is discussed in the note to *Beede v. Wisconsin Cent. Ry. Co.*, 101 Am. St. Rep. 392. As to whether a presumption of negligence arises against the last carrier in case it delivers goods in a damaged condition, see *St. Louis etc. Ry. Co. v. Coolridge*, 73 Ark. 112, 108 Am. St. Rep. 21; *Rolfe v. Lake Shore etc. Ry. Co.*, 144 Mich. 169, 115 Am. St. Rep. 388.

CASEY v. SCOTT.

[82 Ark. 362, 101 S. W. 1152.]

OFFICER—Liability for Acts of Appointee.—A chief of police is not liable for the acts of a dogcatcher whom he appoints, unless he fails to exercise reasonable care in the selection of the appointee. (pp. 80, 81.)

REPLEVIN.—There must be Possession, actual or constructive, in the defendant in order to sustain replevin. (p. 81.)

Pratt P. Bacon, for the appellant.

John N. Cook, for the appellee.

³⁶³ HILL, C. J. Scott brought a replevin suit for an English foxhound bitch against Casey, chief of police, Crowell, the dogcatcher, and the city of Texarkana. A verdict in favor of the city was instructed, and a judgment was rendered against the chief of police and the dogcatcher, and the chief appealed to this court. The dogcatcher did not appeal. Many questions are presented and discussed, but only one will be noticed, as it is decisive of the case.

An ordinance of the city of Texarkana provided for a dog tax and the manner of collecting the same, and contained this provision: "The chief of police shall employ a dogcatcher, whose duty it shall be to catch any and all dogs found running at large upon the streets upon which the tax has not been paid, etc."

The dogcatcher was to be paid fifty cents for catching and twenty-five cents for caring for each dog.

The grayamen of the charge herein is that the dog was illegally taken up and detained and cruelly neglected while in ³⁶⁴ the pound, the result of which was her death since this suit was brought.

"It is a well-settled rule that a public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally co-operated in the negligence": 23 Am. & Eng. Ency. of Law, 2d ed., p. 382.

A sheriff is responsible for his deputies, for they are acting in his private service in his name and stead, and are only public officers through him. A chief of police may select

a police force, but he is not responsible for their acts, as each policeman is a public servant himself. So, under this ordinance, the dogcatcher was a public servant selected by the chief of police, just as a patrolman would be selected by him, or a mayor or other appointing power.

There is no liability in such cases, unless the appointing officer fails to exercise reasonable care in the selection of the appointee, a question not presented here.

There is testimony tending to prove that the owner of the dog made demand on the dogcatcher and tendered the proper fees for the dog, and the dogcatcher referred him to the chief of police as to whether he could retake the dog on payment of the fees without paying the tax, and the chief decided he would have to pay the tax before he could retake the dog. If this tax was illegal, as claimed, the action of the owner was perfected against the dogcatcher in whose possession the dog was. It is elemental that there must be possession, actual or constructive, in the defendant in order to sustain replevin, and there is no kind of possession here shown in the chief of police. It is not proper to herein decide whether an issue might have been framed in an appropriate action against the chief for causing the dogcatcher to hold the dog for an alleged tax; certainly such an issue could not be framed in a replevin suit where the chief had neither actual nor constructive possession.

Reversed and remanded.

Public Officers are ordinarily not liable for the misconduct or malfeasance of subordinates whom they are obliged to employ: *Bailey v. Mayor etc. of New York*, 3 Hill, 531, 38 Am. Dec. 669; *Bowden v. Derby*, 97 Me. 536, 94 Am. St. Rep. 516.

As to When Replevin is Sustainable, see the note to *Sinnott v. Faiock*, 80 Am. St. Rep. 741.

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'ANDERSON v. STATE.

[82 Ark. 405, 101 S. W. 1152.]

LIQUOR—Place of Sale to Minor.—If B, a minor, gives money to A with which to purchase whisky for B, and the liquor is purchased and delivered according to their agreement, but every act in the transaction, except receiving the money from B and delivering the whisky to him, is done outside the state, A does not violate the statutes of the state forbidding the sale or gift of liquor to minors. (p. 83.)

J. T. Cowling, for the appellant.

William F. Kirby, attorney general, and Daniel Taylor, for the appellee.

405 BATTLE, J. The indictment in this case was based upon the following statute: "Any person who shall sell or give away, either for himself or another, or be interested in the sale or giving away of, any ardent, vinous, malt or fermented liquors, or any compound or preparation thereof called tonics, bitters or medicated whisky, to any minor, without the written consent or order of the parent or guardian, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than fifty nor more than one hundred dollars": Kirby's Digest, sec. 1943.

It was alleged in the indictment that "John Anderson, on the eighteenth day of June, 1906, did unlawfully sell and give away **406** and unlawfully was interested in the sale and giving away of ardent, vinous, malt, spirituous and intoxicating liquor to Jim Boyer, a minor under the age of twenty-one years, without the written consent of the parents or guardian of him, the said Jim Boyer."

The defendant pleaded not guilty, and was tried. The following are the facts in the case: Jim Boyer, a minor about fifteen years old, gave to John Anderson, the defendant, fifty cents in money to purchase whisky for him in the state of Texas. The defendant, about the fourth Sunday of June, 1906, in the state of Texas, bought whisky for Boyer, and paid for it the fifty cents he gave him for that purpose; and delivered to him (Boyer) the whisky so purchased, and received nothing in addition to the fifty cents for the same, nor any profit.

Upon these facts the court instructed the jury to find the defendant guilty, which they did and assessed his fine at

fifty dollars. Judgment was rendered accordingly; and the defendant appealed.

Every act of the defendant, except receiving the money and the delivery of the whisky, was done in the state of Texas. The money and whisky were the property of Boyer. No offense was committed in Arkansas, and the defendant was not amenable to the laws of this state.

If Anderson had purchased the whisky in Arkansas, instead of Texas, the purchase would not have been punishable; but he would have been an aider and procurer of the sale, and would have been punishable as a principal in violating the statute inhibiting the sales of whisky to a minor without the written consent of his parents or guardian. In no other way could he have been held guilty of a violation of the statute: *Foster v. State*, 45 Ark. 361. But the procuring and aiding were done in Texas, and he cannot be punished in this state on that account.

This court refused to follow *Commonwealth v. Davis*, 12 Bush, 240, cited by appellee. In *Wallace v. State*, 54 Ark. 542, 16 S. W. 571, Chief Justice Cockrill, in delivering the opinion of the court in that case, said: "The case of *Commonwealth v. Davis*, 12 Bush, 240, is more nearly in point—the language of the statute, 'sell, loan or give' liquor to a minor, being construed to cover every case where liquor was delivered to a minor. The defendant in ⁴⁰⁷ that case might have been convicted of selling liquor to a minor, under the decision in *Foster v. State*, 45 Ark. 328, for he aided the seller in making the sale to the minor, and thereby became a principal in the offense. But we cannot accept the construction placed upon the statute in that case as controlling authority."

Reversed and remanded for a new trial.

The Place Where a Crime is deemed committed, as between two adjoining states, is discussed in the note to *Simpson v. State*, 44 Am. St. Rep. 79. As to the place of an illegal sale of liquor, see *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. PITCOCK.

[82 Ark. 441, 101 S. W. 725.]

CARRIER—Passenger on Free Pass.—A railway company is liable for its negligence to a passenger riding on a free pass which stipulates that the person accepting it “assumes all risk of accidents and damages without claim upon the company,” for such a stipulation is against public policy. (p. 88.)

Oscar L. Miles, for the appellant.

Sam R. Chew, for the appellee.

442 WOOD, J. The conceded facts are that appellee was riding upon appellant's passenger train from Little Rock to Alma, Arkansas; that while so riding he was injured through the negligence of appellant, and that the amount of the damages as found by the jury was not excessive. Appellee did not pay any fare for transportation, but accepted from appellant a free pass, which was indorsed as follows: “The person or persons accepting this pass assumes all risk of accidents and damages without claim upon company.” He accepted transportation on this pass, with full knowledge of the above indorsement, preferring to use the pass rather than to purchase a ticket which contained no limitations upon appellant's liability.

Appellant contends that it is not liable, because appellee accepted a pass which provided that “the person or persons accepting this pass assumes all risk of accidents and damages without claim upon the company.” We are of the opinion that this provision was intended by appellant to exempt it from liability for accidents caused by negligence of the company's agents. For unavoidable accidents it would not be liable anyway, and the case is the same in legal effect as if the clause had contained the words “whether caused by negligence of the company's agents or otherwise.” We do not agree with counsel for appellee that the cases of Northern Pacific Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. Rep. 408, 48 L. ed. 513, and Boering v. Chesapeake Beach Ry. Co., 193 U. S. 442, 24 Sup. Ct. Rep. 515, 48 L. ed. 742, have no application because of the difference of the wording of the exempting clauses in the pass in those cases and the one at bar. The clauses are in legal effect the same, and the cases

are directly in point. The only question for us to determine is whether or not we will follow those cases. In the first of the above cases Mr. Justice Brewer concludes the opinion as follows: "The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in ⁴⁴³ its coaches without charge if he would assume the risk of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common-law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby." In the last of the above cases Judge Brewer also writes the opinion and concludes as follows: "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted." In the first opinion the learned justice cites a number of decisions of state courts and decisions also of the court of queen's bench that support the doctrine announced. He also cites a number of decisions of state courts holding the contrary doctrine. Since there is this diversity of opinion, we feel that we should adopt that view most in accord with our own constitution and statutes, that which comports logically with our own decisions, which conserves a sound public policy, and reflects our own sense of right and justice.

Our constitution provides that all railroads operated in this state shall be responsible for all damages to persons and property under such regulations as may be prescribed by the General Assembly: Art. 17, sec. 12. Section 6773 of Kirby's Digest provides that "all railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state."

Strictly and literally construed, under these provisions railroads would be liable for all damages to persons and property, whether caused through the negligence of the company or otherwise. But this court has construed these provisions of the law to mean that railroads are ⁴⁴⁴ liable only in cases where they have been guilty of some actionable negligence: *Little Rock etc. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 45, 3 S. W. 808; *Little Rock etc. Ry. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55.

As to carriers of passengers, they are not liable for unavoidable accidents. This court has also held that the railway company is not liable to the party injured where the latter's "own negligence or willful wrong contributed to produce the injury of which he complains, so that but for his co-operating and concurring fault the injury would not have happened to him: *Little Rock etc. Ry. Co. v. Pankhurst*, 36 Ark. 371; *St. Louis etc. Ry. Co. v. Freeman*, 36 Ark. 41; *Little Rock etc. Ry. Co. v. Cullen*, 54 Ark. 431, 16 S. W. 169; *St. Louis etc. Ry. Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070. Unavoidable accidents and contributory negligence of the injured party are the only limitations or exceptions thus far recognized and allowed by the court to the constitutional and statutory provisions making railroads liable for all damages to persons or property done or caused by the running of their trains.

This court holds that railroads as common carriers of goods cannot exempt themselves by contract from losses and damages caused by their own negligence: *Taylor v. Little Rock etc. R. Co.*, 32 Ark. 393, 29 Am. Rep. 1; *Taylor v. Little Rock etc. Ry. Co.*, 39 Ark. 148; *Little Rock etc. Ry. Co. v. Talbot*, 39 Ark. 523. We hold that a railway company as master cannot exempt itself by contract from liability to its servants for injuries caused by its negligence in failing to provide a safe place to work and safe machinery, materials and tools with which to operate: *Little Rock etc. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 45, 3 S. W. 808. In *Little Rock etc. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 45, 3 S. W. 808, the court, in passing upon the validity of the contract in which the servant agrees to assume all the risks of his employment and to exempt the company from liability "for any injury or damage he may sustain," uses the following language which is pertinent to the case at bar: "A common carrier or a telegraph company

cannot, by precontract with its customers, relieve itself from liability for its own negligent acts. This, however, may be on the grounds of its public employment." Again: "It is an elementary principle ⁴⁴⁵ in the law of contracts that *modus et conventio vincunt legem*, the form of the agreement and the convention of the parties override the law. But the maxim is not of universal application. Parties are permitted by contract to make a law for themselves only where their agreements do not violate the express provisions of any law nor injuriously affect the interests of the public. Our constitution and laws provide that all railroads operated in this state shall be responsible for all damages to persons and property done by the running of trains. This means that they shall be responsible only in cases where they have been guilty of some negligence. And it may be questionable whether it is in their power to denude themselves of such responsibility by a stipulation in advance. But we prefer to rest our decision upon the broader ground of considerations of public policy." These decisions are grounded upon the principle that it will be detrimental to the public interest to permit railway companies by private contracts to escape a duty which is imposed upon them by law, namely, to respond in damages to every one who may be injured through their negligence. In other words, that it contravenes public policy for railroad corporations to buy immunity from liability which the law imposes upon them, by extending favors as a gratuity, or for a reduced or a nominal consideration, to those who may chance to be injured through their negligence. The reasons for the application of the doctrine may be more obvious and cogent in the cases of carriers of goods and master and servant already decided by this court. But, notwithstanding the difference in the facts, the same doctrine is applicable here, and it is in line with the language and logic of these previous decisions to so hold. The principle upon which the rule is invoked in all these cases is well stated in the case of *Louisville etc. Ry. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869: "A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with the passenger that the latter should take the risk of the negligence of the carrier or his servants. The

law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations ⁴⁴⁶ which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy and therefore void."

We cannot agree with the court and the learned justice who wrote its opinions in *Northern Pac. Ry. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. Rep. 408, 48 L. ed. 513, and *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S. 442, 24 Sup. Ct. Rep. 515, 48 L. ed. 742, that "no public policy was violated" by a contract like the one under consideration, and that to so rule but conforms the law "to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted." That view ignores the duty to the public which railroad corporations virtually undertake to perform when they receive their charters. By virtue of these they have vast privileges of monopoly in transportation, and the absolute right of eminent domain. They owe in turn the duty to exercise ordinary care which in the case of passengers is the highest degree of care that a person of ordinary prudence would exercise, consistent with the mode of conveyance and the proper conduct and management of the business, to see that their passengers are furnished safe and comfortable transportation. They cannot escape this duty. They cannot buy immunity from liability for a failure to discharge it by reduced fare or free transportation. The passenger cannot relinquish the rights which the law gives him in consideration of gratuitous passage. It is not a question of benevolence and hospitality on the part of the carrier in giving, nor the violation of moral obligation on the part of the passenger in receiving without being bound by the terms of the agreement upon which the gratuity was offered and accepted. The question is one of public duty which the state as *parens patriae*, having due regard for the lives and limbs of all her subjects, will not permit to be relegated to the domain of private contract. The interest which the commonwealth has in the comfort and safety of her citizens to see that they are protected from injuries resulting through the negligence of the public carrier or his servants is the same, whether such citizen be a gratuitous passenger or a passenger for hire. As is well said by the supreme court of Minnesota in *Jacobus v. St. Paul etc. Ry. Co.*, 20 Minn. 125: "The more stringent the rule as to the

duty and liability of the carrier and the more rigidly it is enforced, the ⁴⁴⁷ greater will be the care exercised and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said, inevitably tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier, while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and vigilance, it still remains true that the greater the sense of responsibility, the greater the care, and that any relaxation of responsibility is dangerous." Other authorities in support of the rule announced are collated in Cyc. 544, note 59. See, also, 4 Elliott on Railroads, sec. 1608, notes, pp. 2514, 2515. See, also, the comparatively recent case of Yazoo & M. V. R. Co. v. Grant, 86 Miss. 565, 38 South. 502, decided since the decisions of the supreme court of United States *supra*, and referring to them.

Affirmed.

For Authorities in support of the principal case, see Yazoo etc. R. R. Co. v. Grant, 86 Miss. 565, 109 Am. St. Rep. 723; Williams v. Oregon Short Line R. R. Co., 18 Utah, 210, 72 Am. St. Rep. 777; note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 88.

WOOD v. CLAIBORNE.

[82 Ark. 514, 102 S. W. 219.]

PARENT—Authority to Receive Money for Child.—A parent has no authority, as the natural guardian of his minor child before execution of a bond as guardian, to receive money due the infant. (p. 90.)

NEXT FRIEND—Authority to Receive Money for Infant.—Although anyone may bring suit as the next friend of an infant without giving bond, he is not authorized to receive the money upon the judgment recovered. (p. 90.)

ELECTION OF REMEDIES.—It is No Defense to an action by an infant client against his attorney for paying the infant's money to his parent, who had no authority to receive it, that the infant has previously prosecuted an unsuccessful action against the parent to recover the money. (p. 91.)

INFANTS—Interest.—An Attorney Collecting Money for an infant client is not liable for interest thereon, if there is no person authorized to receive it during his minority, until he make demand after reaching his majority. (p. 94.)

Mehaffy & Armistead, for the appellants.

Carmichael, Brooks & Powers, for the appellee.

⁵¹⁷ RIDDICK, J. This is an appeal from a judgment rendered against them in the circuit court in favor of plaintiff for money recovered by defendants for him during his minority and paid by them to his father for him. There are only two questions presented by the appeal that it is necessary to notice: 1. Was the payment of the money to D. W. Claiborne, the father of the plaintiff, for him during his minority unauthorized? 2. Does the fact that the plaintiff previously brought an action and recovered a judgment against his father cut off his right to bring this action against defendants?

As to the first question: It was decided in *Sparkman v. Roberts*, 61 Ark. 26, 31 S. W. 742, that a parent, as the natural guardian of an infant before the execution of a bond as such guardian, had no authority to receive money due the infant. Although D. W. Claiborne, the father of the plaintiff, appeared as his next friend in the action in which the judgment for the money was recovered, yet under our statute a next friend has no authority to ⁵¹⁸ receive the money of an infant recovered in the action brought by him for the infant. Our statute provides that "any person may bring the action of an infant as his next friend; but the court has power to dismiss it if it is not for the benefit of the infant, or to substitute the guardian of the infant or another person as the next friend": Kirby's Digest, sec. 6021.

Under this statute any person may bring a suit as the next friend of an infant without giving bond, and to allow the next friend to receive the money of the infant collected upon the judgment recovered in such actions would subject the estates of infants to spoliation by irresponsible parties appearing as their next friend. We have seen that the statute does not permit even the father or mother of an infant to take charge of his estate without first giving bond as guardian of the infant. There is nothing in the statute that confers such authority upon the next friend of an infant, and we are of the opinion that he has no such authority: *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; *Allen v. Roundtree*, 1 Spear, 80; *Klaus v. State*, 54 Miss. 644; *Gulf etc. R. Co. v. Stryom*, 66 Tex. 421, 1 S. W. 161; 14 Ency. of Pl. & Pr. 1037.

We have examined this question, though the point was not raised by brief of counsel, for the reason that we felt some doubt as to whether an attorney was not justified in paying the money recovered for an infant in an action brought by him by his father as his next friend, but our conclusion is that under a statute like ours such a payment is unauthorized.

The next question, and the one that has been urged with much force by counsel for appellant, is that the plaintiff, by first bringing an action against his father to recover the money paid to him, has elected to ratify the act of the defendants in paying the money to his father, and cannot now maintain an action against the defendants for making such payments. This argument is based on the contention that the prosecution of an action against his father to recover the money paid by defendants to him is inconsistent with a claim for damages against the defendant for making the payment. The rule is well settled that a plaintiff will not be permitted to prosecute two inconsistent actions. For instance, if one brings an action and recovers judgment for the price of a horse which he claims to have sold to the defendant, ⁵¹⁹ he cannot afterward bring replevin to recover the horse on the ground that he never in fact sold it. So the question here is whether the present action against defendants is inconsistent with the action previously brought against his father. After a careful consideration of that question, we are of the opinion that these actions were not inconsistent. The relation between an attorney and client for whom he has collected money is not that of debtor and creditor, but that of principal and agent: *Wallis v. State*, 54 Ark. 611, 16 S. W. 821. The client for whom the money was collected in the former suit was the infant, and not the next friend. When the money was collected, the defendants held it as the agent of the plaintiff. If they wrongfully disposed of it, the plaintiff was not required to elect whether he would sue the defendants for the unlawful conversion of the money or the party to whom it was paid. He had the right to follow the fund and to bring an action against anyone into whose hands it came with notice of plaintiff's rights, without relieving his agents of liability for having wrongfully disposed of the money belonging to him. To maintain the action against the party receiving the money, plaintiff did not have to condone the act of the agent in making the payment or admit that the payment was properly made. On the contrary, his conten-

tion is that the payment by the agent was unlawful, and that both the agent and the party receiving the money are liable.

“All actions which proceed upon the theory that the title to property remains in plaintiff are naturally inconsistent with those which proceed upon the theory that title has passed to defendant. But there is no inconsistency between different remedial rights all of which are based upon claim of title to property in plaintiff”: 15 Cyc. 258, 259. Now, both of the actions instituted by plaintiff in this case are based on the theory that the money paid by defendants to his father belonged to plaintiff. In the action against his father his contention was that his father had received the money of plaintiff, and that, whether wrongfully received or not, he should pay it to plaintiff. In this action he contends that the payment of his money by defendants to his father was without authority, and that, as he has not been able to recover it from his father, the defendants should pay it. If an agent without authority pays money of his principal to an irresponsible ⁵²⁰ person, who squanders it, the principal can recover it from the agent; and it is no defense for the agent to show that the principal first endeavored to collect it from the person to whom it was paid: *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479, 21 N. E. 172, 4 L. R. A. 145; *Vance v. Kirk*, 29 W. Va. 344, 1 S. E. 717.

But there is a distinction between the case of an agent who pays money of his principal in that way and a debtor who pays money to a third person to be paid to the creditor for the debtor. If the person fails to pay the creditor as he promised the debtor to do, the creditor may elect to treat the debt as unpaid and hold the debtor, or he may ratify the act of the debtor and sue the other party for the money, but he cannot do both; and when he brings his action against one, he loses his right to hold the other responsible. This distinction is clearly pointed out in the case of *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479, 21 N. E. 172, 4 L. R. A. 145, above referred to, and the reason why the creditor cannot sue the party to whom his debtor has paid money for him without losing his right to sue the debtor therefor is that the money paid by the debtor in that case belongs to the debtor, and it remains his money until the creditor ratifies his payment. The creditor has no right of action against such third party until he ratifies the payment, for, as before stated, until he does so the money belongs to

the debtor, who must bear the loss if the money is not paid. The creditor is not in law injured by the nonpayment, for his debt is not affected. It follows, therefore, that, if the creditor elects to treat the money paid to the third party as belonging to him and brings suit for it, he cannot afterward sue the original debtor, for as soon as the money becomes the property of the creditor the debt is discharged. After having brought an action and recovered a judgment against the party to whom the debtor paid the money for the creditor, the creditor cannot afterward sue the debtor for the debt, for by the first action the creditor has admitted that the debt was paid, and that the title of the money has passed to him. The two actions are inconsistent, and one is a bar to the other.

But in this case the relation between the defendants and plaintiff was not that of debtor and creditor, but of agent and principal. They did not pay their own money to the father of plaintiff in the attempt to discharge a debt which they owed the plaintiff, but they paid out his own money which they held as ⁵²¹ his agents. If the money was paid without authority, he had at once a right of action both against the agents and the party who received it with notice of his rights. To bar the right of action of plaintiff against his agents, they must show, not only the recovery of a judgment by him against his father, but that the judgment has been satisfied. In other words, it must be shown that plaintiff has received his money or the value thereof: *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479, 21 N. E. 172, 4 L. R. A. 145; *Vanve v. Kirk*, 29 W. Va. 344, 1 S. E. 717; *First Nat. Bank v. Wallis*, 84 Hun, 376, 32 N. Y. Supp. 382; *Carew v. Lillienthall*, 50 Ala. 44; *Crossman v. Universal R. Co.*, 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91; *Equitable Life Assur. Soc. v. May*, 82 Ga. 646, 9 S. E. 597; 28 Am. & Eng. Ency. of Law, 1120, and cases cited.

Having reached the conclusion that the money of the plaintiff held by the defendants as his agents was wrongfully paid out by them, and that the former action brought by plaintiff against his father is not inconsistent with the present action against defendants, and that the claim of plaintiff has not been satisfied, it follows that he is on the undisputed facts entitled to a judgment. The question as to whether the plaintiff was of age or not at the time the first action was brought is not under this view of the case material, nor under this view can the statement of counsel of plaintiff made

in the opening argument, to which objection was made, be considered as prejudicial.

But the court below not only gave the judgment against the defendants for the money collected by them, but for interest thereon from the time it was paid to the father of the plaintiff. Now, if the defendants had retained this money in their possession, they would not have been liable for interest until demand therefor: 4 Cyc. 970. Acting in perfect good faith, defendants paid the money collected by them to the father of plaintiff. As the plaintiff was at that time a minor, the money could not lawfully have been paid to him; and, as he had no regular guardian, it follows, if plaintiff's contention is sound, that the defendants should have retained the money until he arrived of age and demanded it. If they had done that, he would not have been entitled to interest, in the absence of any showing that the defendant had used the money. But it is certain that they did not use it, for it is admitted that they turned it over to his father. The ⁵²² defendants, no doubt, supposed that the money would be disposed of by the father for the benefit of plaintiff in some lawful way, or that it would be kept for the plaintiff and turned over to him upon his arrival of age. Until they were notified of the default of the father, they had no reason to suppose that payment would be required of them, and they were not in default until demand for the money was made on them. So the only damage plaintiff has suffered is the failure to pay him his money with interest from the time he demanded it after he came of age, which was when this action was commenced. The judgment of the circuit court will be modified so as to allow plaintiff judgment for one thousand dollars, with interest from the commencement of this action, and affirmed with that modification. It is so ordered.

The Common-law Powers of Guardians are discussed in the note to *Schmidt v. Shaver*, 89 Am. St. Rep. 257. A next friend cannot compromise and discharge an action by agreement made out of court, where no judgment is entered in pursuance of such agreement, and it is never approved by the court: *Tripp v. Gifford*, 155 Mass. 108, 31 Am. St. Rep. 530. And he cannot receive the money on a judgment in favor of the infant, enter satisfaction, and take the money out of court; much less can he compound the judgment: *Miles v. Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425; *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

COOPER v. SHANNON.

[36 Colo. 98, 85 Pac. 176.]

WATER RIGHTS—Forfeiture—Reappropriation.—If, after execution sale of land, the owner, being entitled to a water right separate from the land, an irrigation company furnishes the execution purchaser of the land with water during the three succeeding years, without any application for the water during such years by the former owner, this does not work a forfeiture of his water right and a reappropriation thereof by the execution purchaser of the land. (pp. 97, 98.)

WATER RIGHTS—Forfeiture.—Although the by-laws of a water company require application for water to be made in writing each year, and provide "that any person entitled to purchase prior water for use upon land entitled thereto, who shall for two successive years fail to pay for water for such land, shall be deemed to have forfeited his right thereto," yet, in the absence of any affirmative action by the company by which the owner of the right was duly notified, such by-laws cannot have the effect of vesting title to the water right in such company, or in another, provided such company delivers the same amount of water to such other. (p. 98.)

WATER RIGHTS—Abandonment—Findings—Appeal.—Abandonment of a water right is a matter of intention, and it is peculiarly within the province of the trial court to determine from all the facts and circumstances of each particular case, whether abandonment has or has not taken place, and a finding of the court upon this question, based upon sufficient evidence, will not be disturbed on appeal. (p. 98.)

WATER RIGHTS—Sale and Transfer of.—Although a water right may be appurtenant to the land, it is the subject of property, and may be transferred either with or without the land, and whether the deed conveys the water right depends upon the intention of the grantor to be gathered from the express terms of the deed, or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident and necessary to the beneficial enjoyment of the land. (p. 98.)

WATER RIGHTS—Conveyance—Sheriff's Deed.—The right to have water delivered at a stipulated price is a valuable right and when the sheriff's deed to the land to which it is appurtenant does not purport to convey such right, there must be some intention to so convey found in the circumstances attending the conveyance before the right will pass under the deed. (pp. 98, 99.)

WATER RIGHTS—Action to Quiet Title—Issues.—In an action by a purchaser at a sheriff's sale to quiet title to a water right alleged to be appurtenant to the land, the question whether the defendant has more water than is actually needed, or not enough for the irrigation of his land, is entirely immaterial. (p. 99.)

WATER RIGHTS—Action to Quiet Title.—In an action by a purchaser at sheriff's sale to quiet title to a water right alleged to be appurtenant to the land, the question as to whether the defendant is entitled to hold a water right for the reason that he is a mere tenant at will cannot be raised by the plaintiff. (p. 100.)

WATER RIGHTS—Ditch Companies—Sheriff's Deed.—A statute requiring ditch companies to furnish water whenever they have water in a ditch unsold, and providing that persons having purchased and used water shall have the right to continue to purchase such water, does not apply to proceedings between individuals only, and when the question to be determined is simply whether a sheriff's deed includes and conveys a water right. (p. 100.)

J. W. Barnes, for the appellant.

J. Hipp, for the appellee.

¹⁰⁰ STEELE, J. The warranty deed to Shannon, the appellee, for the northwest quarter of section 34, township 2 south, of range 69 west, did not purport to convey water rights, but the ditch company incorporated in 1886, the year after Shannon bought the land, recognized his right to the use of twenty inches of water, as a prior right, because he and his grantors had been using water from another ditch which the company incorporated in 1886 had purchased. The company, when it purchased the old ditch, agreed to recognize certain priorities, and Shannon's priority was one ¹⁰¹ that it agreed to recognize, and the records of the company so show. On June 14, 1894, the sheriff of Jefferson county sold at execution sale all the right, title and interest of Shannon in and to the said northwest quarter, and on December 10, 1895, the said sheriff issued his deed to Eugene F. Conant therefor. The appellant, Cooper, holds the land through mesne conveyances from the purchaser at sheriff's sale. In 1902, McCain, from whom Shannon purchased the said northwest quarter, executed a quitclaim deed to Shannon for the right to purchase the twenty inches of water from said ditch, reciting that he had sold the same to Shannon when Shannon bought the land. Shannon has been occupying the northeast quarter of the same section for several years, and has been engaged in cultivating the land, which he holds as lessee. It is contiguous to the land he bought from Mr. McCain, and can be supplied with water

for irrigation from the ditch that supplies water to the northwest quarter. The action was brought by Cooper to quiet his title to the right to purchase twenty inches of water from the ditch. The court found that Cooper was not entitled to the twenty inches, and that Shannon had the right to purchase, and was entitled to the use of, the twenty inches on the northeast quarter of said section. Cooper brings the case here by appeal.

It is claimed by the appellant:

1. The right of appellant to said twenty inches of water intervened as against appellee by reappropriation; and the right of appellee thereto was forfeited.

2. Appellee abandoned said water right, and appellant acquired the same by reappropriation.

3. The said water right is, and at all times has been, appurtenant to said northwest quarter of section 34, and was conveyed as such by the sheriff's ¹⁰² deed to Eugene F. Conant, and by him to the appellant herein.

4. Appellee has no use for the said twenty inches of water, and therefore cannot lawfully hold the right to its use as against appellant.

5. Appellee owns or holds no such interest in the northwest quarter of said section 34 as would entitle him to own and hold the right to said twenty inches of water.

The appellee did not quit the northwest quarter until some time during the year 1898, and did not apply for water during the years 1898, 1899 and 1900. The owners of the northwest quarter did apply for water for these years, and water was furnished them, and water was used during these years on the said northwest quarter.

We are of opinion that the fact that the ditch company furnished water during the years 1898, 1899 and 1900 to the owners of the northwest quarter, and the fact that Shannon, who had lost his land in the year 1898, did not apply for the water for these years, did not operate as a forfeiture of Shannon's interest and as a reappropriation of the twenty inches by the purchasers of the land at sheriff's sale. Although the by-laws of the company require application for the water to be made in writing each year, and that "any person entitled to purchase prior water for use upon land entitled thereto, who shall for two successive years fail to pay for water for such land, shall be deemed to have for-

feited his right thereto," no affirmative action was taken by the company; and in the absence of action by which Shannon was duly notified, the by-law of the company which provides that "any person who shall for two successive years fail to pay for water . . . shall be deemed to have forfeited his right thereto," cannot have the effect of vesting title to the water right in the ¹⁰³ company, or of vesting title thereto in another, if the company delivers the same amount of water to the other consumer. Forfeitures are not favored by the law, and while we do not say that a ditch company may not, by apt words in their contracts or by-laws, provide that a water right shall be forfeited by failure to pay the price for the carriage of water, we do say that the words employed in the by-laws of this company do not so operate.

The court found that Shannon had not abandoned his water right. We shall not disturb that finding. As abandonment is a matter of intention, it is peculiarly within the province of a trial court to determine from all the facts and circumstances of each particular case whether abandonment has or has not taken place.

We have repeatedly held that: "Although a water right may be appurtenant to the land, it is the subject of property and may be transferred either with or without the land: *Strickler v. City of Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313. Being, therefore, a distinct subject of grant, and transferable either with or without the land, whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land": *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355; *Bessemer I. D. Co. v. Wooley*, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1053.

Moreover, the legislature of 1893 requires that all the formalities of the conveyance of real estate shall be observed in the conveyance of water rights. The right to have water delivered at a stipulated price is a valuable right, and as the sheriff's deed does not purport to convey the water right, there ¹⁰⁴ must be some intention to so convey found in the circumstances attending the conveyance. In passing upon this point the trial court held that there was nothing in the

circumstances of the conveyance to show that it was the intention of Shannon to convey the water right. The deed was not a voluntary deed; it was the deed of the sheriff. He had the right to levy upon the water right, but did not do so; and the court's ruling is clearly correct, that the sheriff's intention, or the purchaser's intention, could not control, and that as there was no act of Shannon's from which an intention to convey the water right could be inferred, the water right was not conveyed.

The appellant contends that it appears from the testimony that the appellee is the owner of a water right calling for thirty-five inches of water, which is more than sufficient to irrigate the land cultivated by him in the northeast quarter of said section, and cites authorities which hold that "no right can be secured, either by diversion or appropriation, to more water than is necessary for the proper irrigation of land to which it is applied." The rule of law is one well recognized by the decisions of this court and of the court of appeals, but it is not a question that appellant can inject into this case. That question cannot be determined in a proceeding of this character, where a purchaser of land claims a water right as being appurtenant to land purchased at sheriff's sale. Whether the appellee has more water than is actually needed for the irrigation of his land, or has not enough with which to successfully cultivate his soil, is entirely immaterial to the issue raised. The question is, Did the sheriff by his deed, an involuntary conveyance, convey to appellant's grantor the appellee's water right? In the determination of that question we are not aided by determining either that the ¹⁰⁵ appellee has or has not more water than is necessary for the irrigation of his land.

The fifth and final proposition presented by the appellant is that the appellee is not the owner of land under the ditch; that he is a mere tenant at will of the northeast quarter of said section, and that his interest therein is not sufficient to entitle him to hold his water right as against appellant under the circumstances of the case. The appellant testified that he was occupying the northeast quarter, and had been an occupant of it for eighteen years or more; that he is a lessee and that he cultivated it for several years. No reason is assigned in the brief of counsel why one who is the lessee of land may not own a water right, and we know of no reason why the lessee of land may not buy and hold a water

right, or why a mere occupant of land may not become the owner of a water right, and use it himself or sell it to someone who will use it. Moreover, this question, we think, cannot be raised by the appellant; for, even if the appellee cannot own a water right for the reasons stated, such fact does not vest the title to the water right in the appellant.

We do not regard the rulings of the court upon the trial as constituting reversible error. There was sufficient competent and unobjectionable testimony to sustain the judgment.

Counsel says: "The question of forfeiture and the intervention of the right of appellant, which we consider of the greatest importance in the case, the court passes over very lightly."

The court says, in its opinion: "If Shannon forfeited the right to pay the company one dollar and thirty-five cents an inch to have it carried to him, the company would not on that account alone have the right to carry and deliver it to you, unless the water belonged to Mr. Cooper. I cannot see how, simply by Shannon's failure to go ¹⁰⁸ to the company each season and pay one dollar and thirty-five cents an inch to carry his water, anybody else could bob up and say, 'I will enter into a contract with you to carry Shannon's water for me and thereafter I'll own the water.'"

This, instead of being absolutely wrong, as counsel insists, is, we think, absolutely right. Counsel seems to think that much harm will come, from an affirmance of the judgment, to the ditch companies. He says, "If the judgment is affirmed, then, indeed, ditch companies are between the upper and nether millstones of sections 570 and 2297 of Mills' Annotated Statutes." Section 570 requires ditch companies to furnish water whenever they have water in the ditch unsold, while section 2297 provides that persons having purchased and used water shall have the right to continue to purchase such water. But the ditch company is not before us. We are to determine whether a sheriff's deed for land includes a water right; and we hold that it does not. The ditch company did nothing to forfeit appellee's water right, and we must hold that he still has the right to buy water for a beneficial use, and that the fact that he did not pay for nor apply for the water during the three years mentioned did not work a forfeiture of his right.

The judgment is affirmed.

The Chief Justice and Mr. Justice Campbell concur.

The Right to Use the Water of a Stream, based upon a prior appropriation thereof is a property right which is susceptible of transfer: *Johnston v. Little Horse Creek Irr. Co.*, 13 Wyo. 208, 110 Am. St. Rep. 986. There may be a sale of a water right separate from the land, and an application of the water to other land, so long as the rights of third persons are not infringed: *Cache La Poudre Irr. Co. v. Larimer etc. Co.*, 25 Colo. 144, 71 Am. St. Rep. 123; *Stricker v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245. When sold separate from the land, a water right does not become a mere floating right. It becomes appurtenant to other land, if it is intended by the grantee for irrigation or other beneficial purposes. In the absence of any beneficial use after the sale it will be deemed abandoned: *Johnston v. Little Horse Irr. Co.*, 13 Wyo. 208, 110 Am. St. Rep. 986. Whether a water right passes as an appurtenance to land granted by deed silent as to such right depends upon the intention of the grantor, to be ascertained from the circumstances; and whether such is or is not incident and necessary to the beneficial enjoyment of the land. In the absence of such showing the water right does not pass as an appurtenance: *Bessemer Irr. Ditch Co. v. Woolley*, 32 Colo. 437, 105 Am. St. Rep. 91.

LEIPER v. CITY AND COUNTY OF DENVER.

[36 Colo. 110, 85 Pac. 849.]

MUNICIPAL CORPORATIONS—Liability for Damages Due to Grading Streets.—A municipality is not liable to an abutting lot owner for consequential damages to his property on account of its raising or lowering the grade of the street from the natural surface to the grade established in the first instance, unless such change is unreasonable, or has been negligently made. (p. 107.)

I. R. Howze, for the plaintiff in error.

H. A. Lindsley and H. L. Ritter, for the defendants in error.

¹¹¹ CAMPBELL, J. The sole question for decision is whether a municipality is liable to an abutting lot owner for damages resulting thereto from the authorized lowering or raising of the grade of a public street from the natural surface to a grade established by municipal ordinance in the first instance, notwithstanding the fact that the change is reasonable and the work of making the same is skillfully performed. In *Denver v. Bonesteel*, 30 Colo. 107, 69 Pac. 595, section 15 of article 2 of our constitution, which is here invoked as creating such liability, was considered at some length. It was there held that under this provision, which

declares that private property shall not be taken or damaged for public or private use without just compensation, where a permanent grade of a street is established by a city, and an abutting lot owner improves his property in conformity thereto, the city is liable in damages to such property occasioned by a ¹¹² subsequent change of the grade of the street. In prior decisions of this court, referred to in the opinion, the same clause of the constitution was the subject of careful consideration. While in the various cases the precise question now presented was not expressly determined, the court, as then constituted, made several observations, which were strictly germane to the exact point decided, that indicated its disapproval of the principal now invoked by the plaintiff.

It is true that in some of the cases from other states cited in the Bonesteel opinion, it was ruled that the municipality is liable to an abutting owner for consequential damages caused by a reduction from the natural surface to a grade established in the first instance, as well as from one authorized grade to another. In other cases the doctrine is applied only in the latter contingency. This diversity in the holdings was expressly referred to at page 111 of our opinion. Such reference, however, was not intended as a final or definite expression of our approval of the former doctrine, or rejection of the latter. Yet that opinion shows that not only is there nothing in any of our own previous cases inconsistent with the conclusion then reached, but all such antecedent expressions of opinion were regarded as consistent with the distinction drawn by Judge Dillon in his valuable work on Municipal Corporations, fourth edition, section 995b, which was then clearly indicated as the basis of the decision, and as foreshadowing our present conclusion, namely, that municipal liability in these cases should be limited to changes in established grades, and is not to be extended to reductions from the natural surface, except when the change is unreasonable or carelessly made.

It must be conceded that in Illinois, from which our constitutional provision is borrowed, and in the ¹¹³ majority of the other states that have adopted similar clauses, a municipality is held liable for consequential damages resulting from changes in the grade of the street, whether made for the first time for a change from one established grade to another. However, we are now constrained to hold that for

reasonable, and carefully made, changes of the grade of a public street from the natural surface to a legally established grade in the first instance, a municipality is not liable to the abutting lot owner for consequential damages to his property. We are led to this conclusion, not only because of the strong reasons advanced by Judge Dillon, *supra*, but also because of our former decisions, which, in view of the general understanding of the profession as to the doctrine they announce, should be regarded as *stare decisis*.

Judge Dillon, at section 995a, in stating what the abutting lot owner, who builds with reference to the natural surface, in law is bound to contemplate with respect to the power of the municipality in changing the grade of streets, says: "In view of these considerations, it seems to us clear that for the original establishment of a grade line and the reduction of the natural surface of the street for street purposes to such line, there is no legal right or even natural equity in the dedicator or his assignee to compensation."

He further says: "But where a grade has been officially established, and particularly where improvements have been thereafter made according to such established grade, and it is afterward changed to the injury of the abutting owners, there is a strong natural equity in their favor for compensation. . . . For the reasons above suggested, it seems to us that, on principal, the mere provision of the constitution imposing a liability for property damaged for public use does not create a liability on the part of the municipality ¹¹⁴ for reducing the natural surface of the street, in the course of its normal and ordinary improvement for street purposes proper, to a grade line for the first time established. If there are cases to the contrary we doubt whether they were well considered and think that they are not well decided. . . . Although sensible of the apparent difficulty of defining the grounds for the distinction, it seems to us, where a grade line has been officially established and where property has been improved on the faith of it (which is, of course, done on the assumption that the grade is permanent, although the power to change it for the public good exists), that such a case rests upon so strong a basis of natural justice as to bring it within the purpose of the constitutional provision in question. . . . The decisions under the amended constitutional provision upon the exact point, as to its effect on street grade cases, are not as yet very numerous, but some of those referred to

in the note to the next section appear to give to this provision a scope greater than the one here suggested."

Counsel for plaintiff in error, however, says that these observations of Judge Dillon were made in 1890, and after that time a number of cases by the courts of the states where this constitutional provision is in force have ignored his distinction and held that municipal liability is created whenever consequential damages to the abutting owner result from any change whatever in the grade of a street. A leading case so holding is *Less v. City of Butte*, 28 Mont. 27, 98 Am. St. Rep. 545, 72 Pac. 140, 61 L. R. A. 601, in which the later cases are cited. It is true, as already stated, that the majority of cases support the contention of plaintiff in error, and possibly in only the states of Georgia, Mississippi and Colorado has the qualified doctrine apparently been announced. Notwithstanding the number of cases to the contrary, we are still convinced of the soundness ¹¹⁵ of the views of Judge Dillon, and our previous decisions are in harmony with his conclusion. This is apparent from the following excerpts, taken from several of its opinions:

The leading case is *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6. The precise question there determined was that for consequential damages to a lot abutting on a street over which the city by ordinance had granted to a railroad company the right to build a railroad track, the railroad company, and not the city, was liable. In the course of the carefully considered opinion by Helm, Justice, in discussing consequential damages in such cases, it was said: "But sometimes these interferences and resulting injury may properly, even in this state, be held to be *damnum absque injuria*; as where they are occasioned by a reasonable improvement of the street by the proper authority for the greater convenience of the public." And in speaking of the power of the city over its streets, the judge said: "In determining what changes and improvements are most conducive to this end, the council exercises a large discretion. And unless unreasonable changes are made, or injury results to the adjoining premises through the unskillfulness or negligence of those employed, the owner thereof will not be heard to complain, though, in fact, the real value and convenience of his property are diminished thereby; for, in purchasing his lot, or in relinquishing the public easement, he is conclusively presumed to have contemplated this power and authority of the munici-

pal government, and is held to have anticipated any injury to his abutting land resulting from a reasonable and proper exercise thereof."

The following remark is quite pertinent: "The abutting owner may well be presumed to have taken into consideration the fact that the grade of the street might be raised or lowered, that pavements ¹¹⁶ might be laid and bridges and culverts constructed, and that a street railroad even might be built and operated thereon; and it may fairly be presumed that in purchasing he anticipated and allowed for the possible or probable damages to result from these and similar changes, or that he signified his consent thereto, and thus deprived himself of any right to compensation therefor."

And in referring to the fact that some of the decisions under this constitutional provision would establish the liability of the city in a case like that under consideration, and in summing up the doctrine upon the point, the learned judge concludes: "As will be observed, we do not go so far as some of these cases. That our position might not be misunderstood, we have, at the risk of being charged with obiter dictum, suggested that, as at present advised, we think that for injuries caused by a reasonable change or improvement of the street, by the council, in a careful manner, the abutting owner should not recover."

In *City of Denver v. Vernia*, 8 Colo. 399, 8 Pac. 656, the Bayer case (7 Colo. 113, 2 Pac. 6) was approved, and the concluding observation by Judge Helm, which we have just quoted, was by Chief Justice Beck said to be a correct legal proposition. The concurring opinion of Judge Dickey in *Rigney v. City of Chicago*, 102 Ill. 64, in which the following language was used, was also referred to with approval: "It is not every change of grade made in a street, which may in effect impair the value of the lot in its vicinity, which is a violation of the right of the proprietor thereof. Such changes in a street as it may reasonably be supposed might be made for the improvement of the public highway, the purchaser of a lot upon a street must be assumed to have consented to when the purchase was made. ¹¹⁷ The making of such changes is therefore no invasion of his right in that regard."

One of the elements of damages claimed by the plaintiff against the city in the Vernia case (8 Colo. 399, 8 Pac. 656) was for the fixing of the grade of a street in the first in-

stance three feet below the natural surface of plaintiff's lots, and the court held that that was not an element upon which he was entitled to recover.

In *Denver Circle R. R. Co. v. Nestor*, 10 Colo. 403, Judge Helm, in his concurring opinion, refers to the *Bayer* and *Vernia* cases (7 Colo. 113, 2 Pac. 6; 8 Colo. 399, 8 Pac. 656), and says with reference to the constitutional provision here under consideration that the abutting lot owner was bound to anticipate, in making his purchase, that the street would necessarily be occupied by the local public for all the usual and ordinary purposes of a highway, and that the city would, from time to time, so change and improve the street as to render it more convenient for such purposes, and that indirect injuries resulting to him therefrom remain now, as they existed before the constitutional provision was adopted, wrongs without a legal remedy.

In *city of Durango v. Luttrell*, 18 Colo. 123, 31 Pac. 853, in an opinion by Mr. Justice Elliott, the doctrine was recognized that for a reasonable improvement of the street, by the authority of the city, in bringing it to a legally established grade, no liability for consequential damages to an abutting lot owner resulted.

In *Gilbert v. Greely etc. Ry. Co.*, 13 Colo. 501, 22 Pac. 814, the court remarked that it was not proper to say, notwithstanding the broad terms of our constitution and the unqualified expressions of certain judicial opinions elsewhere, that whenever a depreciation of private property is caused by some public improvement, the owner of the property thus depreciated may recover compensation against the party making ¹¹⁸ the improvement, and again the previous cases, cited above, were referred to with approval.

In *Pueblo v. Strait*, 20 Colo. 13, 46 Am. St. Rep. 273, 36 Pac. 789, 24 L. R. A. 392, Mr. Chief Justice Hayt, in summarizing the doctrine of these cases, says: "For injuries resulting from reasonable and ordinary or usual change and improvement of the street by the municipality the abutting owner cannot recover, provided the change or improvement is made in a careful and skillful manner for the benefit of the public." And in referring to the interpretation put upon similar clauses of the constitution of Illinois and other states, where a recovery is allowed in all cases where private property sustains substantial damage by the making of a public improvement, he recognizes that in Colorado such interpreta-

tion has not been followed, and says that in this state "The right of recovery has been limited to those unusual uses to which but few streets are subjected."

As well said by Judge Dillon, while sensible of the apparent difficulty of defining the grounds for the distinction, we regard it as almost, if not quite, *stare decisis* in this jurisdiction, that, for the raising or lowering of the grade of a street by a municipality from the natural surface to the grade established in the first instance, the municipality is not liable to the abutting lot owner for consequential damages to his property, unless the change of grade is unreasonable, or has been negligently made.

The judgment of the district court, being in line with our conclusion, is affirmed.

Decision en banc.

The Liability of Cities for Changing the Grade of Streets is the subject of a note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 835. It has been decided that under a constitutional provision that private property shall not be taken or damaged for a public use without compensation being first made, a recovery may be had for injuries received from the grading of a street to the first and only grade established thereon: *Less v. Butte*, 28 Mont. 27, 98 Am. St. Rep. 545, and see the cases cited in the cross-reference note thereto.

STICKLEY v. MULROONEY.

[36 Colo. 242, 87 Pac. 547.]

COTENANCY IN MINES—Unauthorized Expenditures—Contribution.—One co-owner in a mine, without the consent of the other co-owners, who have not joined with him, or in some way given their consent to the development or prospecting of such mine, cannot demand from such co-owners contribution or remuneration for expenses incurred in prospecting or developing the common property. He must get contribution, if at all, from the profits realized from the property. (p. 109.)

J. A. Ewing and Patterson, Richardson & Hawkins, for the appellant.

²⁴³ STEELE, J. The plaintiff (appellant here), in his complaint filed in the district court of Lake county, alleged that he, at the time of the filing of the suit, was the owner

in fee of an undivided one-sixteenth interest in the Greenback lode mining claim, situate in said county. He further alleged that the said mining claim was of great value, and that his co-owners, since the year 1894, had been extracting large quantities of gold, silver and lead bearing ores therefrom; and that, after paying the legitimate expenses of mining and extracting the ore and mineral from said premises, the defendants had realized a large sum of money, to wit, the sum of one hundred and sixty thousand dollars. He prayed judgment for the sum of ten thousand dollars, for an accounting, and for an injunction restraining the defendants from in any manner disposing of the proceeds arising from the premises, and that the said injunction be made perpetual. Later, he applied for a receiver. The application for the receiver was denied, but the court, finding that the defendants had certain sums of money in their hands which they held as trustees for the plaintiff, ordered paid into the registry of the court the amount of money due to Stickley as the owner of the one-sixteenth interest in the property.

In June, 1901, the defendants filed a petition in the district court setting forth that they were owners of an undivided fifteen-sixteenths interest in the said lode, and that the title to the one-sixteenth interest was in dispute. They further represented that they had been operating said premises for many years past, and that on or about the 28th of September, 1900, there had been a profit realized to the one-sixteenth interest of upward of six thousand ²⁴⁴ four hundred dollars, and that that amount had been paid into the registry of the court pursuant to the order of the court. They further set forth in said petition that, since the said 28th of September, no proceeds had been realized from the operation of said premises, and that, since the last order of court, there had necessarily been incurred a certain indebtedness for and on behalf of the interests in said Greenback lode amounting to upward of thirty-two thousand dollars, and praying the court for an order to withdraw from the registry of the court the sum of fifteen hundred dollars. This application was resisted, and a hearing was had. The court ordered the sum of fifteen hundred dollars to be paid by the clerk to the defendants. The plaintiff appealed to the court of appeals.

It appears from the testimony taken that the mine was shut down and filled with water in July, 1900; that the water remained in the shaft from July until January, 1901,

and that the money expended had been expended in exploration and in sinking the shaft. It further appears that there were no shipments made from the mine after June, 1900; that the shaft had been sunk about one hundred and twenty-five feet, and that much of the money which it was stated had been expended upon the property had been expended in buying a plant of machinery. The plaintiff requested the court to require the defendants to give a bond for the return of the fifteen hundred dollars, which the court refused. The plaintiff never granted permission to the defendants to expend money in his behalf in the working of the property; and it was stated, on cross-examination, that the plaintiff never notified the defendants herein not to work the property.

The judgment must be reversed. It appears to be well settled that one co-owner, without the consent ²⁴⁵ of the other co-owners, cannot demand from the co-owners, who have not joined with him or in some way given their consent to the development or prospecting in mining property, remuneration for expenses incurred in so prospecting or developing the common property. At the time the deposit was paid into the registry of the court, the mine had been operated for several years by the owners of fifteen-sixteenths interests in the property, and a large profit had been realized from the ore. After this division of profits was made, the mine was shut down. Thereafter the owners of the majority interests began further developments and prospecting, and spent large sums in such work, as well as in the purchase of machinery, and it is for this they ask contribution from the plaintiff, and it was for these expenditures that the court ordered the sum of fifteen hundred dollars withdrawn from the registry. After a balance has been struck and a division of profits made, under the circumstances present in this case, if the owners of a majority interest desire to make further exploration of the property, they have a right to do so, but they cannot require the minority owners to contribute their share of the expense incurred in so doing out of the profits divided; they must get contribution, if at all, from the further profits realized from the property.

“A cotenant in possession, whether his interest be large or small, cannot bind those who do not voluntarily participate in the venture. He cannot force contribution for improvements made, nor for the cost and expense of developing or working”: Lindley on Mines, 1422; Neuman v. Dreifurst, 9

Colo. 228; Rico Red. etc. Co. v. Musgrave, 14 Colo. 79; Brunswick v. Winter's Heirs, 3 N. Mex. 24.

The judgment is reversed.

The Chief Justice and Mr. Justice Campbell concur.

Cotenancy in Mines is the subject of a note to Cedar Canyon Con. Min. Co. v. Yarwood, 91 Am. St. Rep. 851.

The Liability of One Cotenant to another for rents and profits received from and for expenditures made upon the common property is the subject of a note to Ward v. Ward, 52 Am. St. Rep. 924. Compensation for improvements made on property owned in common is further discussed in the note to Cleland v. Clark, 81 Am. St. Rep. 185.

SNYDER v. COLORADO SPRINGS AND CRIPPLE CREEK DISTRICT RAILWAY COMPANY.

[36 Colo. 288, 81 Pac. 686.]

RAILROADS—Passengers—Negligence—Proximate Cause.—If a conductor, in pushing his way through a crowded car, presses a standing passenger against a seated passenger, who gives the standing passenger such a push as to throw him from the car, to his great injury, the proximate cause thereof is the action of the seated passenger, and the railroad company is not liable therefor. (p. 112.)

J. J. McFeely, for the plaintiff in error.

E. E. Whitted, P. H. Holme and Lunt, Brooks & Wilcox, for the defendant in error.

289 BAILEY, J. This is an action by plaintiff against defendant to recover for injuries received by plaintiff while traveling on defendant's cars as a regular passenger, going from the city of Cripple Creek to a station known as Midway. At the close of plaintiff's testimony, the court, upon motion of defendant, instructed the jury to return a verdict in favor of the defendant, which was done.

The case comes here upon error, and the error assigned is this instruction and verdict.

There is no dispute as to the facts, which appear to be that on the night of December 20, 1900, plaintiff was a passenger on defendant's car, going from Cripple Creek to Midway. He had paid his fare, the car was crowded, and, after leaving Fairview, plaintiff was standing near the door, with his hand

resting on the door jamb. There were people between plaintiff and the door, some upon the steps. The head of the man upon the lower step reached to about the thigh of the plaintiff. The conductor, in pushing his way through the crowd, pressed plaintiff against a party who was sitting in a seat on the side of the car. This man became angry, said that he was "Getting tired of playing cushion for the electric line," and raised up against the plaintiff and gave a "surge," by the force of which plaintiff was thrown from the car, passing over the head of the man who stood upon the lower step.

In plaintiff's brief it is said, in effect, that the court below, in passing on the motion for nonsuit, ²⁹⁰ dwelt at considerable length upon the question as to what was the proximate cause of this accident. The court came to the conclusion that the proximate cause was the action of the passenger, and, therefore, the company was not liable.

So the question for us to determine is as to what was the proximate cause of the accident.

Proximate cause is: "That cause which, in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred": *Denver etc. R. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093.

It was defined by the court of appeals as being "that cause which immediately precedes and directly produces an effect, as distinguished from a remote, mediate or predisposing cause": *Burlington etc. R. R. Co. v. Budin*, 6 Colo. App. 275, 40 Pac. 503. "An act is the proximate cause of an event when, in the natural order of things, and under the particular circumstances surrounding it, such an act would necessarily produce that event": *Burlington etc. R. R. Co. v. Budin*, 6 Colo. App. 275, 40 Pac. 503.

"The law will not look back from the injurious consequence beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage": *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 41 N. E. 1, 41 L. R. A. 794.

"The nature of the intervening cause which will render an original cause for which the author is sought to be held liable in damages too remote for recovery must be simply such as interrupts the usual and ordinary and experienced sequence

of events, and produces consequences at variance therewith": *Watson on Damages for Personal Injuries*, sec. 7.

"If the original wrong only becomes injurious in consequence of the intervention of some distinct ²⁹¹ wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote": *Cooley on Torts*, 70.

"The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening or contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen": *Lane v. Atlantic Works*, 111 Mass. 136.

"One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable": *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Burlington etc. R. R. Co. v. Budin*, 6 Colo. App. 275, 40 Pac. 503.

Tried by these tests, the defendant is not responsible for the consequences of the passenger's act. There is nothing to show that such a consequence as happened was liable to occur. It was, of course, possible, that some extremely nervous or irritable person would become angry because of his being inconvenienced on account of the crowded condition of the car, but it is not in accordance with the usual and ordinary course of events to anticipate that a seated passenger would so far lose control of himself on account of having a standing passenger crowded against him that he would eject the standing passenger from the car with such force as to throw him over the head of one who was standing upon the step below the party so ejected.

²⁹² It is apparent from the record in this case that the proximate cause of the injury to plaintiff was the action of the irritated passenger, and that this cause could not be anticipated by defendant or its agents. The plaintiff, however, contends that this question should have been submitted to the jury. This course would have been necessary if material facts had been in dispute, but where, upon all the evidence,

the court is able to see that the resulting injury was not proximate but remote, the plaintiff fails to make out his case, and the court should so rule: *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

If the matter had been submitted to the jury and the verdict had been rendered in favor of plaintiff, it would have been the duty of the court to set it aside. Consequently, it was his duty to direct the verdict: *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212.

The court having committed no error in sustaining the motion and directing the verdict, the judgment of the district court will be affirmed.

Chief Justice Gabbert and Mr. Justice Goddard concur.

The Doctrine of Proximate Cause is the subject of a note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807. The general rule is, that if an injury results in consequence of a wrongful act, but only through or by means of some intervening cause, from which last cause the injury follows as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that which was more remote: *Alabama Great Southern R. Co. v. Vail*, 142 Ala. 134, 110 Am. St. Rep. 23; *Georgetown Tel. Co. v. McCullough*, 118 Ky. 182, 111 Am. St. Rep. 294; *Little Rock Traction etc. Co. v. McCaskill*, 75 Ark. 133, 112 Am. St. Rep. 48.

NUSLY v. CURTIS.

[36 Colo. 464, 85 Pac. 846.]

WILLS.—General Legacies are Such as are payable out of the general assets of the testator's estate, such as gifts of money or other things in quantity, and not in any way separated or distinguished from other things of like kind. (p. 115.)

WILLS.—Specific Legacies are gifts by will of specific articles, or particular parts of the testator's estate, which are identified and distinguished from all others of the same nature, and which are to be satisfied only by the delivery and receipt of the particular things given. (p. 115.)

WILLS.—Demonstrative Legacies.—A demonstrative legacy partakes of the nature of both a general and specific legacy, and is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. (p. 115.)

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WILLS—Legacies—Ademption.—A specific bequest is subject to ademption, but not so a general or a demonstrative legacy. (p. 115.)

WILLS—Legacies—Interpretation of.—Courts are not inclined to favor specific legacies, and if compatible with the language employed, are disposed to interpret legacies as general or demonstrative; but if the language is clear, and plainly evinces an intent to create a specific legacy, such effect must be given to the language used. (p. 115.)

WILLS—Legacies—Interpretation of.—In ascertaining the nature of a legacy, the question is one of intent, to be gathered from the language used in creating it, in the light of the circumstances of the testator and the property he is disposing of in his will. (p. 115.)

WILLS—Specific Legacies—Ademption.—If a testatrix by her will gives to five specified legatees the entire proceeds of an insurance policy on her husband's life, provided the money is actually received and collected by her executors, and she afterward collects the entire fund during her lifetime, and mingles it with her property generally, so that no part of it is traceable into her executor's hands, such legacies are specific, and by her act became adeemed. (p. 118.)

F. A. Williams, for the plaintiff in error.

Wolcott, Vaile & Waterman, H. H. Dunham and W. W. Field, for the defendants in error.

466 CAMPBELL, J. In this proceeding the plaintiffs in error asked for an interpretation of the second clause of the last will of Eliza C. Gallup, deceased, under which they claim as legatees. It reads:

“Second. Any and all sums of money which may at any time hereafter become due and payable to me or my estate, by or under any insurance policy upon the life of my husband Francis Gallup, which may heretofore have been insured, payable to me or in my favor, I will and bequeath to the five sisters of my said husband, or to such of them as may be living at the time any such insurance moneys shall be actually collected and received by my executors, to be divided equally among said sisters or the survivors of them, as hereinbefore provided.”

The facts pertinent to the only question argued on this review are that before the execution of the will an insurance policy for five thousand dollars upon the life of Francis Gallup was issued. About a year after its execution he died, and the amount of the policy on his life (five thousand dollars) was received by the testatrix herself in her lifetime, which she commingled with her other funds, and afterward reinvested. Not only was this amount not actually collected or received by the executors, but it was not traceable or iden-

tified in their hands. At the time of the death of the testatrix, which was more than eleven years after the will was executed, the plaintiffs in error, the five sisters of Francis Gallup who were mentioned in the will, were all living.

The only question raised and decided below, and the only one presented here, is as to the nature of this legacy. The plaintiffs in error say that it is a demonstrative legacy, and therefore it was not adeemed by the testatrix in her lifetime. The defendants in ⁴⁶⁷ error say that it was a specific legacy, and was subject to be, and as a matter of fact was, adeemed by the testatrix in her lifetime by collecting and commingling it with her other funds. It is sufficiently exact for our present purpose to say that a general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind. A specific legacy is a gift by will of a specific article, or a particular part of the testator's estate which is identified and distinguished from all others of the same nature, and which is to be satisfied only by the delivery and receipt of the particular thing given. A demonstrative legacy partakes of the nature of both a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. A specific bequest is subject to ademption, but such is not true of a general, or a demonstrative, legacy. The trial court held that this was a specific legacy, and was adeemed by the testatrix in her lifetime. Hence it construed the will as passing nothing to the plaintiffs in error as legatees.

We are of opinion that the county court was right in its decision. Courts are not inclined to favor a specific bequest. If compatible with the language employed, they are disposed to interpret gifts as general, or demonstrative, legacies; but if the language is clear and unequivocal, and plainly evidences an intent of the testator to create a specific legacy, such effect must be given to that language. In ascertaining the nature of a given legacy, some, but not much, aid is to be derived from the adjudicated cases. The question is one of intent, to be gathered from the ⁴⁶⁸ language used in creating it, in the light of the circumstances of the testator and the property which he is disposing of in his will. It will

be observed that no particular or designated sum of money is mentioned in the clause of the will under consideration. It is a gift of "any and all sums of money which may at any time hereafter become due and payable to me or my estate, by or under any insurance policy upon the life of my husband, Francis Gallup, which may heretofore have been insured." It is only such sums of money that she bequeaths to the five sisters of her husband, or to such of them as may be living when the moneys shall be actually collected and received by her executors to be equally divided among them. This language plainly evidences an intent to bequeath not any particular sum of money to be payable primarily out of the proceeds of the insurance policies, and if the fund, for any reason, should fail, then out of the general assets of the estate; but, on the contrary, the testatrix thereby intended to give to the legatees named only such sums of money as her executors after her death actually collect and receive on certain insurance policies. The language employed negatives an intention to give them anything whatever if the moneys on the policies are received by her in her lifetime, or if the fund, for any other reason, fails or ceases to exist, as such, at her death.

Not only does the language of this will compel this interpretation, but the application of the appropriate principles of law, and the definition of the different kinds of legacies, lead to the same result. It will further be observed that this is not a gift of money "out of" or "from the proceeds of" any insurance policy, but it is a gift of the entire fund itself. It is just the same as if the policy itself had been bequeathed.

⁴⁶⁹ The authorities clearly sustain the conclusion which we have reached. Many of them are collected in 18 American and English Encyclopedia of Law, second edition, 711 et seq. It has been held that a gift of all the money due on a particular bond is as much a specific legacy as a gift of the bond itself. The same principle is applicable to an insurance policy. A gift of an insurance policy is no more specific than is a gift of all the money due thereon: *Ashburner v. Macguire*, 2 Bro. C. C. 108; *Stout v. Hart*, 7 N. J. L. 414; *McMahon's Estate*, 132 Pa. 175, 19 Atl. 68. So a bequest of all, or part, of a specific fund, or money which shall be received under decree in a certain suit, or a gift of "all the amount of moneys and interest that may be recovered of

and from K, for the sums due me on the purchase of the (described) estate," each was held to be specific: *Gilbreath v. Alban*, 10 Ohio, 64; *Chase v. Lockerman*, 11 Gill & J. 185, 35 Am. Dec. 277; 2 Williams on Executors (Perkins' Notes), 1262 et seq., notes D, H and M.

In *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576, though the particular legacy there was held to be a general legacy, the court, inter alia, says: "A specific legacy is a particular and specified thing singled out, or a particular fund, and, if this fund fail, or the specific thing bequeathed is not in existence to be carried over to the legatee, the legacy cannot be paid out of the assets of the estate." That remark is peculiarly applicable here, for the entire fund of the insurance policy was given to these legatees, and since it was not in existence at the time the will took effect, but had been collected by the testatrix in her lifetime, it became adeemed.

In *Walls v. Stewart*, 16 Pa. 275, the court says: "Where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden ⁴⁷⁰ that object alone with the payment, it is esteemed specific, and consequently liable to be adeemed by the alienation or destruction of the object." Accordingly in that case it was held that a legacy charged on certain devised lands was specific, and became adeemed when the land was sold by the testator in his lifetime.

In *Smith's Appeal*, 103 Pa. 559, there was a bequest by a testator to one son of two thousand dollars out of the sum of near four thousand dollars on deposit in a bank, provided the same was collected, and to another son fifteen hundred dollars with the same proviso, and the remaining part of the money that might be collected on this deposit was given in equal shares to the two sons. This deposit was collected by the testator, and the court held that the legacies to the two sons, being specific, were adeemed. The following language from the opinion of the court, being peculiarly appropriate to the case in hand, we quote it:

"The whole of the money, the entire fund, is given—the money and fund are undistinguishable. When the legacy is so connected with the fund out of which it is payable that the legacy and fund are the same, it is specific; as if I bequeath to B. the money now owing to me from A. or in the hands of A., or the money due to me on the bond of A., the legacy is specific: *Welch's Appeal*, 28 Pa. 363. Certain

parts of money due to the testator on the deposit are given to each son, and the money thus given is the whole deposit owing by the bank.

“The giving to each a certain portion—to both the whole—is indicative of an intent to give that fund—not so much money out of the estate if the fund failed. The phrase, ‘I give and bequeath to my son Samuel the sum of two thousand dollars out of the sum of near four thousand dollars now on deposit in the bank,’ by itself, would vest a demonstrative legacy; but the testator added, ⁴⁷¹ ‘providing the said amount and interest is collected from the assets or stockholders of said bank.’ Manifestly, the word ‘providing’ is used in the sense of ‘provided,’ and means upon condition, or with the understanding, that said two thousand dollars shall be collected out of that debt. Then, if it should not be collected out of the specified debt, it was not to be paid. Here, also, the intention seems to be to limit payment of the legacy to the fund itself.”

Let us apply the principles of that case to the one in hand. Mrs. Gallup gave to the legatees the entire proceeds of an insurance policy, provided the money was actually received and collected by her executors. The entire fund, or the policies and the money collected thereon, are given. The legacy and the fund are the same and undistinguishable. Her executors did not collect or receive the money. She herself collected it in her lifetime. The legacies, therefore, were specific and became adeemed. In *Smith v. McKittrick*, 51 Iowa, 548, 2 N. W. 390, two thousand dollars which the testator received from the estate of his father was bequeathed to the testator's daughters. It was said to be a specific legacy.

Certainly, from the language employed in Mrs. Gallup's will, it could not be successfully contended that, if the insurance money had never been collected, the plaintiffs in error would have had any claim upon the general assets of her estate. If that be true, this legacy is specific. There was no gift of any particular or specified amount, but the entire fund, showing an unambiguous intention to confine the gift to the fund itself.

In *Georgia Infirmary etc. v. Jones*, 37 Fed. 750; Wallace, Justice, says: “In determining whether the legacy is specific or demonstrative, the question always is whether it is a gift out of a specified fund or security, or a gift of a specified sum, with a specified ⁴⁷² fund as security. If it falls within

the former class"—that is, where it is a gift of a specified fund, or security—"the legacy fails when the fund or security ceases to exist in the testator's lifetime."

In *Hoke v. Herman*, 21 Pa. 301, it was said that if the thing bequeathed in a will by such a description as to distinguish it from all other things be disposed of, so that it does not remain at the death of the testator, the bequest is gone. "If such legacy be of a debt, payment necessarily makes an end of it." In the case in hand, the money that became due and was payable to the testatrix in her lifetime was a debt, and there was a gift of the entire debt. Since the testatrix in her lifetime collected it and commingled it with her funds, necessarily there was an end of it, and nothing remained at her death to which the legacies here claimed could attach.

Corbin v. Mills' Exrs. 19 Gratt. 438, is cited by plaintiffs in error as in point. The particular bequest there under consideration was held to be a demonstrative legacy, but the language of the will by which the legacy was created is entirely different from that in the will of Mrs. Gallup. The opinion of the court with reference to this particular point would make the legacy here involved a specific legacy.

In *Barker v. Raynor*, 5 Madd. 208, the testator's will read: "All my right, title and interest in two policies of insurance (describing them) upon trust to pay," etc. These policies were upon the life of the testator's wife, and were collected by him in his lifetime. The legacy was held to be specific. This bequest in legal effect is precisely the same as the one here where the moneys to be collected on the policy are the subject of the bequest. Such moneys constituted all the right, title and interest which the beneficiary had in them. This decision ⁴⁷³ by Vice-Chancellor Leach was affirmed on appeal by Lord Chancellor Eldon in 3 Eng. Ch. 126. The case is quite in point: *Starbuck v. Starbuck*, 93 N. C. 183; 2 Redfield on Wills, 431.

In 1 Underhill on Wills, section 414, the learned author says a legacy of a debt is specific, but a legacy of a particular sum payable out of a debt due to the testator is demonstrative. Applying the doctrine of the text and of the authorities already cited to the case at bar, we have this situation: The thing given by Mrs. Gallup was the entire debt which the insurance company was obligated to pay to her or her estate upon the death of her husband. There was no par-

ticular sum given, nor was that which was given made payable out of the debt due the testatrix, but being the corpus of the debt itself, it was a specific legacy: *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247; *Maybury v. Grady*, 67 Ala. 147.

Let the judgment be affirmed.

Chief Justice Gabbert and Mr. Justice Goddard concur.

Specific Legacies are bequests of a specified part of a testator's personal estate, distinguished from all others of the same kind: *Rogers v. Rogers*, 67 S. C. 168, 100 Am. St. Rep. 721. They are such only as designate particular things, or things by a particular description: *Cooch v. Cooch*, 5 Houst. (Del.) 540, 1 Am. St. Rep. 161. For illustrations of specific legacies, see *Tomlinson v. Bury*, 145 Mass. 346, 1 Am. St. Rep. 464; *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675; *Evans v. Hunter*, 86 Iowa, 413, 41 Am. St. Rep. 503; *Williams v. McKeaud*, 119 Mich. 507, 75 Am. St. Rep. 420.

To Constitute Pecuniary Demonstrative Legacies, it is necessary that there be a gift of a certain sum of money, and such gift must be given with reference to a particular fund, as a primary but not exclusive source of payment: *Rogers v. Rogers*, 67 S. C. 168, 100 Am. St. Rep. 721. See, further, the note to *Brill v. Wright*, 8 Am. St. Rep. 721.

A General Legacy is one payable out of the general assets of the estate. It is one so given as not to amount to a bequest of some identical thing or fund forming part of the testator's estate, or of a sum payable out of such identified fund: *Brill v. Wright*, 8 Am. St. Rep. 721.

The Ademption of Legacies is the subject of a note to *Miller v. Malone*, 95 Am. St. Rep. 342. That ademption applies only to specific legacies, see *Rogers v. Rogers*, 67 S. C. 168, 100 Am. St. Rep. 721.

LIVESAY v. FIRST NATIONAL BANK.

[36 Colo. 526, 86 Pac. 102.]

TROVER AND CONVERSION—Pleading.—If a complaint for trover and conversion alleges that the defendants wrongfully took the chattels described from plaintiffs and converted them to their own use, an answer denying that the defendants, or any of them, took such chattels when in the possession of plaintiffs, or in any manner as set up in the complaint, and further alleging separate levies in favor of each of the defendants, does not admit a joint taking. (p. 122.)

TORTS—Joint Tort-feasors.—The fact that several execution and attachment creditors gave to a sheriff separate and independent indemnifying bonds does not tend to prove, in a joint action against them for trover and conversion, that by thus ratifying the acts of the sheriff each defendant thereby made itself a joint tort-feasor with the other defendants. (p. 123.)

PLEADING—Joint Liability.—The mere fact of joining in a joint answer by defendants who are charged with joint liability

has no weight as evidence to prove such joint liability, in the absence of other acts which tend to prove such joint liability. (p. 123.)

TORTS—Joint Tort-feasors—Joint Liability—Directing Verdict. A failure to prove the joint liability of all the defendants, in an action against them as joint tort-feasors, is a failure to prove the cause of action alleged, and in such case the proof of several separate and distinct trespasses only is fatal to the cause of action, and warrants the court in directing a verdict for the defendants. (p. 124.)

TORTS—Joint Tort-feasors—Liability.—Persons who act severally and independently, each causing a separate and distinct injury, cannot be sued jointly, as joint tort-feasors, even though the injuries may have been precisely similar in character, and inflicted at the same time. A joint tort is essential to the maintenance of a joint action. (p. 125.)

G. N. Hurd and H. L. Ritter, for the plaintiffs in error.

C. J. Hughes, Jr., G. Hughes and Bicksler, Bennett & Nye, for the defendants in error.

528 **MAXWELL, J.** This was an action brought by M. G. Palmer, Edwin P. Estes and the Post Printing and Publishing Company, as plaintiffs, against the appellees, for damages alleged to have been sustained by plaintiffs by reason of the wrongful taking and conversion by the defendants of a stock of goods alleged to have been, at the time of the taking, the property of plaintiffs, and in the possession of their agent under and by virtue of the terms of a chattel mortgage given to secure pre-existing indebtedness due plaintiffs.

The complaint alleged substantially, that March 1, 1897, Charles A. Estes was the owner and in the possession of property, and on that day was indebted to plaintiffs in certain amounts evidenced by promissory notes, to secure the payment of which he executed a chattel mortgage upon the property, which was duly filed for record, and on the same date the property was taken possession of by the agent of the mortgagees; and while the property was so in the possession of plaintiffs, the defendants wrongfully and unlawfully took possession of same and converted same and the proceeds of sale thereof to their own use.

The defendants, by a joint answer, denied the material allegations of the complaint; justified the **529** taking of the property by the sheriff under several writs of execution and attachment against the property of Charles A. Estes issued upon judgments and in suits pending against said Estes in favor of defendants; averred the ownership of the property in said Charles A. Estes, the illegality of the chattel mortgage,

the subsequent sale of the property and application of the proceeds of such sale in part satisfaction of the judgments in favor of defendants.

The reply met the affirmative allegations of new matter in the answer. At the close of plaintiffs' testimony the court directed a verdict in favor of defendants, whereupon a judgment of dismissal against plaintiffs was entered, to review which this writ of error is prosecuted.

The only question for review is the action of the court in directing a verdict. This ruling was based upon the proposition that plaintiffs, by their pleadings, charged defendants with a joint tort; that the evidence introduced failed to prove the cause of action alleged.

An exhaustive review of plaintiffs' evidence upon the only point involved will not be attempted; it would accomplish no beneficial purpose. Very briefly stated the evidence may be said to establish, that at about 8:30 A. M. March 2, 1897, a deputy sheriff came to the store where the property was, with a writ of execution or attachment in favor of one of the defendants and against the property of C. A. Estes, and said that he took possession of the stock of goods under the writ by direction of the parties; that at 10 A. M., 2 P. M. and 5 P. M. of the same day other writs in favor of other defendants and against said Estes were delivered to the same officer; that the officer was in the store continuously from 8:30 A. M. to 5:30 P. M.; that during this entire time plaintiffs' agent was also in the store, but that the officer did ⁵³⁰ not allow him to sell the goods or remove any portion of them or otherwise exercise acts of ownership over them; that during the day the attorneys of several defendants were in the store from time to time; what they did or what was their purpose in being there does not appear; that at about 5 P. M. plaintiffs' agent left the store and the property in possession of the officer and did not return; the writs by virtue of which the officer took possession of the property and the returns thereon were not introduced in evidence.

It is contended by plaintiffs in error that the answer admits the joint taking. We do not so read the answer.

Paragraph 6 of the complaint is: "That while the said goods and chattels were in the possession of the plaintiff, as aforesaid, the said defendants, . . . wrongfully, forcibly, and against the plaintiff's protest at the time made, and without plaintiff's consent, took the aforescribed goods and chat-

tels situate at number 921 Sixteenth street aforesaid, from the plaintiffs and have ever since kept the same, converted the same or the proceeds from the sale thereof to their own use in the county and state aforesaid."

The foregoing is the only allegation in the complaint setting up the taking and conversion of the property. This allegation is denied by the answer as follows: "That they deny that the defendants mentioned in paragraph numbered 'sixth' in plaintiffs' said complaint, or any of them, took the goods and chattels in said complaint described when they were in the possession of the plaintiffs, or any of them, or in any manner as in said complaint alleged."

Further, the second affirmative defense of defendants contains a paragraph setting forth the separate levies of the several writs in favor of the several ⁵³¹ defendants, from which it appears that some of the levies were alleged to have been made March 2d, one March 3d and one March 4th. This contention of plaintiffs in error is not tenable under the pleadings as set forth in the record.

The fact that several defendants gave the sheriff separate and independent indemnity bonds did not tend to prove that by thus ratifying the actions of the sheriff each defendant thereby made itself a joint tort-feasor with the other defendants.

The authorities are to the effect that the giving of an indemnifying bond to an officer holding a writ is a ratification of the acts of the officer and nothing more.

No authority has been cited and we know of none which holds that the separate and distinct act of giving an indemnifying bond to an officer by each of a number of creditors pursuing their remedy under separate writs constitutes such creditors joint tort-feasors.

We do not believe the mere fact of joining in a joint answer by defendants who are charged with joint liability has any weight as evidence to prove such joint liability in the absence of proof of other acts or facts which would prove such joint liability.

The court in ruling upon the motion for a directed verdict, at the request of counsel for plaintiffs in error, stated the ground upon which the ruling was made as follows: "The motion is granted on the ground that there is no joint wrong proven, and that there is insufficient evidence to show concert of action among the defendants." It is contended that the

court thereby invaded the province of the jury and passed upon the sufficiency of the evidence.

⁵³² The practice of setting aside a verdict upon motion for a new trial, when the evidence is insufficient to sustain it, is authorized by Mills' Annotated Code, 217, subdivision 6, and of directing a verdict for the defendant for the same reason, is well established by the appellate courts of this jurisdiction.

As was said in *Brown v. Potter*, 13 Colo. App. 512, 514, 58 Pac. 785: "When we conclude, as we do, that the court reached a correct conclusion respecting the testimony, it was both his right and his duty to direct a verdict because it was a case wherein, if a verdict had been rendered otherwise, it must have been set aside as against the testimony. Under these circumstances, the duty of the trial court is exceedingly plain: *Tripp v. Fiske*, 4 Colo. 24; *Guldager v. Rockwell*, 14 Colo. 459, 24 Pac. 556; *Burlington R. Co. v. Budin*, 6 Colo. App. 275, 40 Pac. 503; *Union P. R. Co. v. Sternberg*, 13 Colo. 141, 21 Pac. 1021; *Stratton v. Union P. R. Co.*, 7 Colo. App. 126, 42 Pac. 602."

The question then is, Was there sufficient evidence to warrant the court in submitting to the jury the issue of joint liability by reason of the joint acts of the defendants?

It is admitted that the action was against the defendants as joint tort-feasors. A failure to prove the joint liability of all the defendants was a failure to prove the cause of action alleged. Proof of several separate and distinct liens or trespasses was fatal to the cause of action and warranted the court in directing a verdict.

The rule is thus stated by Pomeroy in his work on Remedies and Remedial Rights, second edition, page 265: "In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties ⁵³³ who are to be united as codefendants; the injury must in some sense be their joint work. It is not enough that the injured party has, on certain grounds, a cause of action against one, for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort; there must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application."

“Persons who act severally and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same time. A joint tort is essential to the maintenance of a joint action. For separate and distinct wrongs in nowise connected by the ligament of a common purpose actual or implied by law, the wrongdoers are liable only in separate actions, and not jointly in the same action”; citing cases: 15 Ency. of Pl. & Pr. 562.

The principle is the same whether the question is *ex contractu* or *ex delicto*.

In *York v. Fortenbury*, 15 Colo. 129, 25 Pac. 163, a joint loan to the plaintiffs was pleaded as a defense. At the trial evidence was offered to show a separate loan to one of the plaintiffs. This offer was rejected and upon appeal the rejection was held proper. The court said: “The answer averred a joint loan to the plaintiffs. The proof rejected showed that the loan in question was made to Fortenbury individually, Carson deriving no benefit therefrom, and not being in any way connected therewith. The allegation of a loan to both plaintiffs is not sustained by proof of an individual loan to one of them. There was, therefore, ⁵³⁴ such a variance between the pleading in question and the proof offered as justified the court’s rejection of the latter.”

Other cases announcing the same doctrine are: *Williams v. Sheldon*, 10 Wend. 654; *Keys v. Little York Gold Washing etc. Co.*, 53 Cal. 724; *Blaisdell v. Stevens*, 14 Nev. 17, 33 Am. Rep. 523; *Forbes v. Marsh*, 15 Conn. 384; *Larkins v. Eckwurzell*, 42 Ala. 322, 94 Am. Dec. 651; *Miller v. Highland Ditch Co.*, 87 Cal. 433, 22 Am. St. Rep. 254, 25 Pac. 550.

The great weight of authority supports the principle that, where two or more parties act each for himself and independently of each other in a proceeding, the results of which may be injurious to another, they cannot be jointly held liable for the acts of each other.

Reithman v. Godsman, 23 Colo. 202, 46 Pac. 684, is relied upon by plaintiffs in error. This was a case in which Reithman and the sheriff are sued as defendants to recover damages for taking and converting the property of Godsman under a writ issued against one Dunnagan. There was, in that case, no question of the joint wrong of two or more attaching creditors, and what is there said as to the effect of giving an indemnity bond to the sheriff, as an act of ratification, goes

only to the extent of holding that such act was a ratification of the acts of the sheriff only. The expression of the court in that case to the effect that, when two writs of attachment are actually levied and action taken at the same time, "the plaintiffs in both actions may be liable for the taking," is not an authority to the point that such plaintiffs would be liable in a joint action, or could be held as joint tort-feasors, in the absence of evidence tending to prove, or proving, concert of action between the parties.

Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727, cited by counsel for plaintiffs in error, is the only authority to which ⁵³⁵ our attention has been called which seems to support the position of plaintiffs in error. It is opposed to the great weight of authority, and the expressions contained in the opinion, upon which plaintiffs in error rely, do not seem to us to be necessary to the decision of the case which was before the court.

Upon principle and authority, we believe the rule to be as above quoted.

We have examined the entire record with care, and fail to find any competent evidence therein that there was any concert of action between the several attachment and judgment creditors, or any ligament of common purpose which would make them liable as joint tort-feasors for the acts of which complaint is made.

The judgment will be affirmed.

Chief Justice Gabbert and Mr. Justice Gunter concurring.

The Joint and Several Liability of Creditors for wrongfully procuring the levy of attachments on the property of their debtor is discussed in Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118; Farwell v. Becker, 129 Ill. 261, 16 Am. St. Rep. 267; Springfield v. Hirsch, '94 Tenn. 425, 45 Am. St. Rep. 733.

Actions for Wrongful Attachments are discussed in the notes to Burton v. Knapp, 81 Am. Dec. 467; Bradshaw v. Frazier, 86 Am. St. Rep. 397.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

MARCH v. BRICKLAYERS' AND PLASTERERS' UNION
NO. 1.

[79 Conn. 7, 63 Atl. 291.]

A LABOR UNION has No Right to Inflict a Penalty upon, or to Assess Damages Against, One Who Owes It No Duty through association in the membership in the union or by contract or otherwise, nor to overawe him into the payment of something by means of threats of injury in its power to inflict and of such a character as to naturally arouse a reasonable apprehension of serious consequences to him in the event of his refusal. (p. 130.)

A LABOR UNION is Guilty of Extortion in fining a manufacturer of brick for selling his product to a boss mason, who employs nonunion men, and then threatening such manufacturer and another boss mason to whom he has sold other brick, that if the fine is not paid, the union will withdraw all its men from the job, and will forbid its men to handle any of the manufacturer's brick, unless the fine is first paid, and he, having yielded to this pressure, and paid the fine, may recover of the union the sum so paid. (p. 131.)

EXTORTION by a Labor Union by Threat of a Lawful Act.— That the threat by which a labor union obtains money is to do an act which it may lawfully do does not always relieve its action, when it obtains money thereby, from the stigma of extortion. (p. 131.)

Action to recover money claimed to have been extorted by the defendants from the plaintiff. He was a manufacturer and seller of brick. The defendant union was an association of bricklayers and plasterers, and the defendant Butler was its financial secretary and also its business agent, as well as a member. Among his duties to the association was the reporting to it all manufacturers who sold to any boss mason proscribed by the union as "unfair." The union voted that its members would not handle any brick of a manufacturer

who sold to an "unfair" boss, and notice of this action was mailed to the plaintiff and other brick manufacturers in the vicinity. After receiving a notice, plaintiff sold some brick to a boss designated as "unfair," and the committee thereupon assessed a fine of one hundred dollars against him. Subsequently he sold and began to deliver brick to Flynn, known as a "fair" boss mason, whom the defendant Butler visited, and had a talk with plaintiff and Flynn, and gave them to understand that unless the fine was paid, all workmen would be withdrawn from Flynn's job, and thereby induced the plaintiff, through Flynn, to pay the fine to Butler, who turned it over to the defendant union.

Joseph P. Tuttle, for the appellants.

Walter S. Schultz and Stanley W. Edwards, for the appellee.

¹⁰ PRENTICE, J. The complaint alleges that the defendants conspired, combined and confederated with each other and with other persons to extort, demand and obtain from the plaintiff the sum of one hundred dollars; that in pursuance of that conspiracy and combination they threatened to injure the plaintiff in his property and business unless said sum was paid; and that by reason of said conspiracy and combination, and of said threats, intimidation and coercion, and by such means alone, said sum was paid by the plaintiff to the defendants. It is found that the payment was made, that the combination between the members of the defendant union to secure that payment, and Butler's agency for it, existed, and that the ¹¹ money was paid through the operation of that combination. So far there is no contention here.

The plaintiff further claims that the combination for the purposes of its controversy with him, resulting in the payment by him, was an unlawful one. He claims that it was unlawful (1) because its object was unlawful, and (2) because the means to accomplish that object were unlawful. He also claims that, as the payment was one into which he was coerced through the operation of this unlawful conspiracy, he is entitled to recover it back. The defendants do not deny that a combination or confederation of men, either for the accomplishment of an unlawful object or for the accomplishment of a lawful object by unlawful means, is unlawful; neither do they deny that if the combination between them,

which resulted in the payment in question, was an unlawful one, the plaintiff is entitled to recover. The contention between the parties, therefore, becomes primarily resolved into one as to whether the conceded confederation of the defendants, through which the payment was obtained, was an unlawful one by reason of the unlawful character of either its object or the means employed.

The plaintiff asserts the right to a judgment upon narrower grounds than those suggested, and notwithstanding a failure to establish an unlawful conspiracy. This claim, however, is subordinate to his main proposition, and need not be considered unless it shall appear that his principal contention, already stated, fails him.

The disagreement between the plaintiff and the defendants as to the lawfulness of the object of the latter's combination is one which arises chiefly, if not entirely, out of a difference of view as to what is to be regarded as that object. The defendants say that the object was the ultimate object of the union, to wit, among other things, the promotion of the welfare of its members and the advancement of their rights and privileges as laboring men; or, if not that, the freeing of themselves from the competition of those not members of the union; or, if not that, and the object is to be brought into closer relation to the matters in controversy, ¹² the compelling of "unfair" bosses to become "fair." The plaintiff finds the object sought in an attempt to punish him for his business dealings contrary to the wishes of the union, by the exaction from him of one hundred dollars as the price of his freedom from harassment in the marketing of his product.

These differences in the analysis of the situation disclosed by the record are more formal than vital. Their chief importance arises from the changed form which must be given to the discussion of the underlying questions involved, and the different use of terms which must be made according as one view or the other be adopted. For the purposes of our consideration, therefore, we may well assume, as did the court below, that the object sought by the defendants in what they confederated to do was some one of the more remote objects claimed by them, and that this object was a lawful one. This, of course, involves the transferring into the field of means that which would in the other view be regarded as an end, and the consideration of all that the defendants did in the accomplishment of its object as means to that accomplishment.

The question before us thus becomes narrowed down to the single inquiry as to whether or not the defendants in the pursuit of their object—whether it be regarded as their general welfare as laboring men, the diminution of outside competition, or the enlargement of their field of opportunity by increasing the number of employers of union labor only—used unlawful means. This question suggests the possibility of a wide range of inquiry, involving the consideration of important legal principles which have been much discussed, and upon certain of which there has been some divergence of opinion. The facts of this case, however, are such as to require from us the application of no principles which have not been long and well established, all but few of them.

The salient facts in the story spread upon the record are, that this defendant association, through their representative the defendant Butler, demanded of the plaintiff the payment to them of a sum of money, upon the threatened alternative¹³ that if payment was refused he would, by their action in refusing to handle his product in their work then in progress, be annoyed and harassed in the enjoyment of the benefit of the market for that product which he had obtained, and in all probability be wholly deprived of that market. The action thus threatened was within the power of the defendants to take. The consequences which would flow to the plaintiff from it, if taken, were such as might well excite in him a reasonable apprehension of serious injury. To the pressure thus brought to bear upon him he yielded and paid the sum exacted.

There is nothing in the record to relieve this picture. It does not improve it to say that the defendants were seeking to enforce a penalty or to collect damages assessed. They had no right to inflict a penalty upon, or assess damages against, this man who owed them no duty through association in the membership of the union, by contract, or otherwise. The plaintiff owed them nothing. To overawe him into the payment of something, by means of threats of injury in their power to inflict and of such a character as to naturally arouse a reasonable apprehension of serious consequences to him, in the event of his refusal, was an act of the purest extortion—using that word in its widest meaning—and in the plainest violation of our statute (section 1296), of our decisions, and of the universally accepted principles of the common law: *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890;

State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769. The statement of what the defendants undertook to do easily discloses that this is not the ordinary case found in the books, involving the exercise by trade, capital or labor combinations, of claimed powers, in their struggles for success. These cases have not infrequently called for the determination of nice legal questions, and the application of doctrines which, while they might be pertinent to the present situation, are wholly unnecessary for the decision of the simpler question before us.

The most elemental principles of justice and right, which have by universal consent been adopted into the common¹⁴ law, suffice for a conclusion that money cannot be lawfully exacted of a man in the manner here successful. We are aware of no case where in the progress of a labor or trade controversy a similar attempt to extort money as the price of forbearance from threatened injurious action has ever come before the courts, save that of *Carew v. Rutherford*, 106 Mass. 1, 8 Am. St. Rep. 287, where the attempt is characterized as a species of annoyance and extortion which the common law has never tolerated.

It is attempted to justify the action of the union in its money demand, upon the proposition that as its members had the right to decline to handle the plaintiff's brick they had the right to waive the exercise of that right upon such conditions as they might impose. The proposition is, that money demanded and obtained as the price of forbearance from the commission of an act of injury—even when the commission of that act is held over the man to coerce and intimidate him into compliance with the demand—is lawfully obtained, if the threatened act was one which the threatener might lawfully do. Such a proposition could oftentimes be used to justify the vilest blackmailer, and is palpably unsound in that it ignores certain elements which may be present to convert the proceeding into a wrong or a crime: 28 Am. & Eng. Ency. of Law, 2d ed., 141.

It is further said that the action of the defendants was justified in the exercise of the rights of fair trade competition. If it be assumed that these journeymen bricklayers and this brick manufacturer, whose business touched each other only in that the latter sold brick to persons for whom the former worked, are to be regarded as trade competitors, so that the recognized doctrines applicable to such competitors

are applicable to them, it yet remains that the means resorted to in this case would not be permitted.

There is no error.

In this opinion the other judges concurred.

On What Constitutes the Crime of Extortion, see the recent note to *State v. Coleman*, 116 Am. St. Rep. 446.

Boycotting is the subject of a note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488.

NORTON v. CONSOLIDATED RAILWAY COMPANY.

[79 Conn. 109, 63 Atl. 1087.]

STREET RAILWAYS—Conductor must be Controlled by the Face of Transfers.—A transfer ticket is the only evidence of the right of the passenger which the conductor can properly accept, and if such ticket does not appear to be for the conductor's line, the passenger has no right to ride thereon, though the reading of the ticket is due to the mistake of a prior conductor, for which the passenger is not at fault. (pp. 135, 136.)

STREET RAILWAYS.—Though a Conductor Gives a Passenger a Transfer Different from that for Which He Asks, the remedy is not by refusing to pay fare and resisting expulsion from a car, but by leaving the car, or paying a new fare, and commencing an action against the railway company for its breach of contract to give a proper transfer. (p. 136.)

STREET RAILWAYS—Right of the Person to Whom an Erroneous Transfer has been Given.—Though a passenger on a street railway demands a proper transfer, and by the mistake or carelessness of the conductor is given one for another line, such passenger has no right to resist expulsion if he enters a car of a line over which his transfer does not entitle him to ride, though he explains the mistake to the conductor. (p. 136.)

STREET RAILWAYS.—It is not the Duty of the Conductor to Accept a Statement by a Passenger that a Mistake in His Transfer is the Fault of a Prior Conductor.—As between the passenger and the conductor to whom the transfer is presented, it is conclusive. (p. 137.)

George D. Watrous and Henry F. Parmelee, for the appellant.

Benjamin Slade, for the appellee.

¹⁰⁰ HALL, J. The complaint alleges that the defendant is a common carrier of passengers by an electric street railway, and that, on the day named, while the plaintiff was lawfully riding as a passenger in one of the defendant's cars, and had paid his fare for transportation to Winchester avenue, ¹¹⁰ in

the city of New Haven, he was unlawfully assaulted by the conductor of the car in attempting to forcibly remove him from the car.

As appears from the finding of the facts, the plaintiff and his wife, who resided on Winchester avenue, and were accustomed to ride upon the street-cars in the city, and were familiar with the manner in which they were operated and with the defendant's system of giving transfers from one line to another, were, during the evening of August 25, 1905, passengers on an electric street-car of the Savin Rock line, operated by the defendant, upon which line transfer tickets are given to the passengers desiring to be transferred to another of the defendant's lines, the names of which are printed upon the transfer tickets, and among which are the Winchester avenue and the State street lines. Upon such transfer tickets are also printed: "Not good except at transfer points, and in the direction indicated on first car after time canceled."

While on the Savin Rock car the plaintiff paid the fare and requested transfers to the Winchester avenue line, which connects with the Savin Rock line at the corner of Church and Chapel streets, and from said corner runs westerly along Chapel street. In delivering a transfer to a passenger, the conductor punches or perforates it opposite one of the names of lines printed on it, in such a manner as to indicate upon which line it may be used. The transfers delivered to the plaintiff by the conductor of the Savin Rock car were not punched opposite the name of the line "Winchester Ave.," but were punched opposite the name of the line "State St.," and so as to indicate that the passenger presenting it was entitled to ride upon a car on the State street line only, which line, from the corner of Church and Chapel streets, extends northerly along Church street.

The plaintiff and his wife left the Savin Rock car at the corner of Church and Chapel streets and entered the first Winchester avenue car which passed, and upon presenting to the conductor on that car said two transfers was informed ¹¹¹ by him that they were not good because they were punched for State street. The plaintiff stated to the conductor that they had just alighted from a Savin Rock car and had asked the conductor of that car for Winchester avenue transfers, and that it was not his fault that that conductor had made a mistake, and upon repeated requests refused to

either pay his fare or leave the car. The conductor thereupon attempted to remove the plaintiff from the car by force, using no more force than was necessary and reasonable therefor, but desisted from such attempt after the plaintiff resisted such removal.

Upon these facts the trial court held that the plaintiff was lawfully riding upon the Winchester avenue car, and had the right to resist the attempt to expel him therefrom upon his refusal to pay his fare; that the conductor was not justified in attempting to expel the plaintiff, and that he unlawfully assaulted him; and rendered judgment for the plaintiff for two hundred dollars as substantial damages.

This is an action to recover damages for the alleged tort of the defendant's servant in attempting to forcibly eject the plaintiff from the car, and not for the recovery of damages for a breach of the contract of carriage made by the plaintiff and defendant. The defendant justifies the attempted expulsion of the plaintiff upon the ground that the latter unlawfully persisted in remaining and riding in the car, without either paying his fare or producing a transfer ticket purporting to entitle him to ride in that car; and that no unreasonable force was used in the attempt to remove him.

As it is found that no unnecessary force was employed, the case must turn upon the question of whether, upon the facts stated, the plaintiff had the right to insist upon being carried upon the transfer ticket which he presented, and to forcibly resist the conductor's attempt to expel him.

The plaintiff contends that though the transfer check may have been *prima facie* evidence of a different contract of carriage, yet the facts show that when he paid his fare to the conductor upon the Savin Rock car and requested ¹¹² of him a transfer to Winchester avenue, the real undertaking of the defendant was to carry him by a Winchester avenue car; and that, having informed the conductor of the Winchester avenue car of these facts, and of the mistake of the conductor of the Savin Rock car in wrongly punching the transfer, he was entitled to be carried upon the Winchester avenue car.

In the absence of any statutory or other express provision or regulation defining the contract of carriage between electric street railway companies, and the rights of their passengers in cases like the present, they must be ascertained by considering all the circumstances indicating the intention and understanding of both parties, including not only what is required

for the reasonable safety, convenience and comfort of passengers, but what is reasonably necessary to enable the company to properly perform the functions for which it was created, and what the known and reasonable rules of the company are with reference to which the parties are presumed to have contracted.

There are certain facts and established rules connected with the operation of electric street railways, which in these days are familiar to every person of ordinary intelligence who has occasion to ride on them, and which are to be regarded in determining what the real contract of carriage is in a case like the present one. Among them are these: That the mere payment of the ordinary fare in a street-car does not, of itself, as upon a steam railroad, indicate the designation of the passenger, nor suggest that he desires transportation by another line and upon another car; that a passenger upon one line desiring to be transferred to another, operated by the same company, must pay his cash fare on the first car; that upon such payment he will be carried, in that car, to the point of transfer to the second line; that before leaving the first car he must obtain from the conductor of it a ticket indicating upon its face his right to take passage upon a car of the second line; that as to the conductor upon the second car, the person receiving such transfer ticket enters that car like ¹¹³ all other passengers taking the car at that point, and will not be permitted to ride unless he either pays his fare or presents a proper transfer; and it is the office of the conductor of the second car to determine the right of the passenger to ride upon that car, and that upon the presentation of a transfer ticket, the ticket itself is the only evidence of such right which the conductor can properly accept.

In our opinion the facts fail to show that when, on the Savin Rock car, the plaintiff paid his fare and asked for a transfer to Winchester avenue, the defendant undertook, absolutely, to carry him upon a Winchester avenue car, even if he failed to either pay his fare or present a proper transfer ticket on that car. They show that the real contract of the defendant was to carry the plaintiff, upon the first car, to the proper point of transfer to the second line; to furnish him a proper transfer ticket to entitle him to a passage on a car of the second line; and to carry him upon that line, upon the presentation of such transfer or the payment of his fare to the conductor of the second car.

Through the carelessness of its servant, in not giving the plaintiff the transfer ticket which he asked for, the defendant failed to perform its contract. For such breach of contract the plaintiff would have been entitled to compensation for the loss or injury, had there been any, which necessarily followed from the defendant's failure to furnish him a proper transfer ticket. His remedy for such breach of contract was not to refuse to pay his fare and to forcibly resist being expelled from the car. As the transfer ticket which he presented did not even purport to authorize him to ride on a Winchester avenue car, the conductor of that car, notwithstanding the plaintiff's explanation of the mistake, was justified in refusing to accept it, and in requiring him to pay his fare or leave the car; and after the demands made by the conductor it became the plaintiff's duty to either pay his fare or peaceably leave the car: *Downs v. New York etc. R. Co.*, 36 Conn. 287, 4 Am. Rep. 77; *Havens v. Hartford etc. R. Co.*, 28 Conn. 69; ¹¹⁴ *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Dixon v. New England R. Co.*, 179 Mass. 242, 60 N. E. 581; *Crowley v. Fitchburg etc. Street Ry. Co.*, 185 Mass. 279, 70 N. E. 56; *Thorp v. Concord R. Co.*, 61 Vt. 378, 17 Atl. 791; *Monnier v. New York etc. R. R. Co.*, 175 N. Y. 281, 96 Am. St. Rep. 619, 67 N. E. 569, 62 L. R. A. 357; *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794, 52 L. R. A. 626; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Brown v. Rapid Ry. Co.*, 134 Mich. 591, 96 N. W. 925; *Keen v. Detroit Electric Ry.*, 123 Mich. 247, 81 N. W. 1084; *Frederick v. Marquette etc. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Pine v. St. Paul City Ry. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 397; *Western Maryland R. Co. v. Schaun*, 97 Md. 563, 55 Atl. 701; *Western Maryland R. Co. v. Stocksedale*, 83 Md. 245, 34 Atl. 880; *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 26 Am. St. Rep. 913, 11 S. E. 737, 9 L. R. A. 132; *McGhee v. Reynolds*, 117 Ala. 413, 23 South. 68.

A rule requiring the expulsion from a car of a passenger who refuses to either pay his fare or produce a ticket showing his right to ride on such car is a reasonable one: *Downs v. New York etc. R. Co.*, 36 Conn. 287, 4 Am. Rep. 77; *Havens v. Hartford etc. R. Co.*, 28 Conn. 69; *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Shelton v. Lake Shore etc. Ry. Co.*, 29 Ohio St. 214; and one which, from the fact that it is so general with carriers, as well as from the

facts found in this case, was evidently well known to the plaintiff.

In ascertaining whether the plaintiff was entitled to ride on the Winchester avenue car, it was not the duty of the conductor of that car to accept the statement made to him by the plaintiff that the mistake in his transfer was the fault of the conductor of the Savin Rock car: *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295; *Downs v. Hartford etc. R. Co.*, 36 Conn. 287, 4 Am. Rep. 77. As between the second conductor and the plaintiff, the transfer ticket was conclusive as to the latter's right to be carried as a transferred passenger upon the Winchester avenue car. "As between the passenger and the conductor of the car in which he is, the terms of the ticket or check are conclusive,"¹¹⁵ and the right to ride upon it on that train is, for the time being, to be determined accordingly": *Baldwin on American Railroad Law*, 292; *Mosher v. St. Louis etc. Ry. Co.*, 127 U. S. 390, 8 Sup. Ct. Rep. 1324, 32 L. ed. 249; *Poulin v. Canadian Pac. Ry. Co.*, 52 Fed. 197, 17 L. R. A. 800, 3 C. C. A. 23, and cases above cited.

There is a conflict of authorities in other jurisdictions upon the questions of the conclusive character of such a ticket, as between the passenger offering it and the conductor to whom it is presented; of the terms of the contract of carriage; and of the right of the passenger to forcibly resist expulsion in cases like the present one. In the case of *Indianapolis Street Ry. Co. v. Wilson*, 161 Ind. 153, 100 Am. St. Rep. 261, 66 N. E. 950, 67 N. E. 993, decided in 1903, in which the claims of the present plaintiff are sustained by the majority opinion, these questions are very ably discussed and the authorities fully cited upon both sides. In our view the dissenting opinion of Judge Gillett, in which Judge Monks concurred, is sustained by the better reasons and by the greater weight of authority,

Our conclusion is that the plaintiff, having by his own wrongful conduct invited the use of force, cannot now complain of the use by the defendant of reasonable force in the attempt to remove him from the car.

The trial court erred in holding that the plaintiff was entitled to substantial damages.

There is error, and the case is remanded for the assessment of nominal damages.

In this opinion the other judges concurred.

The Doctrine of the Principal Case is probably not in harmony with the majority of recent decisions in other jurisdictions: Georgia Ry. etc. Co. v. Baker, 125 Ga. 562, 114 Am. St. Rep. 246; Citizens' St. R. R. Co. v. Clark, 33 Ind. App. 190, 104 Am. St. Rep. 249; Memphis St. Ry. Co. v. Graves, 110 Tenn. 232, 100 Am. St. Rep. 803; Indianapolis St. Ry. Co. v. Wilson, 161 Ind. 153, 100 Am. St. Rep. 261.

STRONG'S APPEAL.

[79 Conn. 123, 63 Atl. 1089.]

WILLS, Revocation of.—No Act of Tearing or Cancellation Destroys a Will, Unless it is done with the intention of revoking it. The intent to revoke may be absolute and final, or dependent on the existence, or the belief in the existence, of certain circumstances. (p. 139.)

WILLS, Revocation of, Through Mistake, Effect of.—A writing purporting to revoke a will on account of the existence of a certain fact does not revoke it, if there is no such fact. It is not material whether the mistake is one of fact or of law. (p. 140.)

WILLS, Revocation of, in the Mistaken Belief that Another Will has Become Effective.—Though the testator tears his will and writes thereon "superseded by a written one," when in fact the written will has not been so executed as to become effective, the first will is not thereby revoked, especially when the old and the supposed new will are found in the same envelope, and it is evident that whatever the testator did constituted one transaction proceeding from the same intent and actuated by the same cause. (p. 140.)

Walter C. Noyes, for Julia C. Strong et al.

Alfred Coit, for Henry R. Bond et al., executors and trustees.

¹²³ BALDWIN, J. Jonathan N. Harris died in 1897, leaving by his will his residuary estate in trust for twenty-one years, and the life of his wife; a certain share of the annual income to be meanwhile annually paid to a niece of his wife, Miss Elizabeth M. Strong, during her life. At the end of that period, she was, if then living, to have a corresponding share of the principal. She was also given power to dispose by will of both the income and principal of such share,¹²⁴ should she die before the trust was terminated. A few months later, in the same year, Miss Strong made a will bequeathing a silver tea-set to an uncle, and exercising the power conferred by Mr. Harris in such a way as to give the income of her share of the trust fund to her father for life,

remainder to her mother for life, remainder to her sister, the appellant, for life, remainder in fee to her brother.

Subsequently—her father and mother having died and the financial condition of the appellant having improved—Miss Strong expressed the intention of changing her will so as to exercise the power in favor of her brother, alone. After this, in 1905, she fell sick, and died after a three days' illness, during most of which she was delirious. The will of 1897 (which was typewritten) was found in an envelope in her bureau drawer, each page torn in two lengthwise, but the cover un-torn. She had written at the top of the first page, "Superseded by written one." In the same envelope was an unsigned draft of a will in her handwriting. This contained the same bequest of the tea-set; provided for the disposition of some other family silver; and ended thus: "The income left to me by the will of Jonathan N. Harris of New London at my death I desire should go to my brother Edward L. Strong, the said Edward L. Strong to have said income during his life or in case the trust be terminated, said portion of the principal to be paid to him his heirs & assigns forever."

Neither the typewritten will nor the written draft contained any residuary provisions, nor did the latter bear any date or have any subscription clause. Miss Strong's heirs at law were the appellant, her brother, and another sister. Her relations to the appellant were most affectionate. The will was torn a short time previous to her death, but whether during or before her last illness could not be ascertained.

The income and principal of her share (the amount of which was over fifteen thousand dollars) in the trust fund, in default of her exercise of her powers, was, by the will of Mr. Harris, to go to certain of his nephews and nieces and their representatives.

¹²⁵ The paper presented to the court of probate as the will of Miss Strong was in a condition which had some tendency to show that she had revoked it. It had been torn, and it had been marked by her as "superseded by written one." It has not been found by the superior court that she tore it, but we shall treat the case as if such a finding had been made, and as if whatever she did was done before she became delirious in her last illness.

No act of tearing or cancellation destroys a will unless it be done with the intention of revoking it. An intent to revoke

may be either absolute and final, or dependent on the existence or a belief in the existence of certain circumstances.

The words "superseded by written one" sufficiently indicate that when Miss Strong wrote them she assumed that the draft in her handwriting then had full testamentary force and effect, and so, as it covered the same ground in a different manner, had destroyed her previous dispositions by will. These are treated as destroyed simply because they had been replaced by something else. Here she was acting under a mistake, and one apparent from the words used to effect the cancellation. This mistake was plainly the sole cause for the revocation which she intended to declare. Unless she exercised the power of disposition given her by Mr. Harris, the fund which was subject to it would go to strangers to her blood. The main object both of the will and of the draft will was to exercise it.

The case, therefore, is within the reason of a rule that a writing purporting to revoke a will on account of the existence of a certain fact does not revoke it if there be no such fact: *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642.

It is true that the mistake is, at bottom, one of law. Miss Strong supposed that her unsigned and unattested will would have full effect upon her decease. In law it had no effect. But as respects a question of this nature, it is immaterial whether the mistake under which the act of revocation was done were one of fact or law. The act was nothing, unless done with the intent of revocation. If ¹²⁶ the intent to revoke was, as in this case, clearly dependent on a reliance upon a certain legal consequence attributed to certain circumstances, an error in attributing that effect to them is as effectual a bar to an actual revocation as if it were a pure error of fact: *Security Co. v. Snow*, 70 Conn. 288, 66 Am. St. Rep. 107, 39 Atl. 153; *Stickney v. Hammond*, 138 Mass. 116; *Clarkson v. Clarkson*, 2 Swab. & T. 497.

The expression of the motive for the act of cancellation must govern the result of the act of tearing the will. The will and draft will having been found in the same envelope, it is evident that whatever Miss Strong did constituted one transaction proceeding from the same intent and actuated by the same cause.

It is found by the superior court that the will signed in 1897 was executed in all respects according to law, and that Miss

Strong was then of full age and sound mind and memory. It should therefore have been admitted to probate.

The superior court is advised to disaffirm the decree of the court of probate, and admit the paper propounded as the will of Miss Strong to probate, as such.

No costs will be taxed in this court.

In this opinion the other judges concurred.

In Order to Revoke a Will a joint operation of act and intention is necessary: *McIntyre v. McIntyre*, 120 Ga. 67, 102 Am. St. Rep. 71, and cases cited in the cross-reference note thereto. If a portion of a will is canceled or erased by the testator, with a view to further disposition of the property, which proposed disposition fails for want of authentication, the presumption in favor of a revocation by cancellation is repelled, and the instrument will stand as originally framed, so far as it is practicable to ascertain what the former words were: *Thomas v. Thomas*, 76 Minn. 237, 77 Am. St. Rep. 639. See the note to *Graham v. Burch*, 28 Am. St. Rep. 344.

BARKER v. LEWIS STORAGE AND TRANSFER COMPANY.

[79 Conn. 342, 65 Atl. 143.]

A BAILOR may Recover of His Bailee for the Latter's Conversion of the thing bailed. (p. 143.)

WAREHOUSEMEN, Joint Liability of to Joint Bailors.—If a warehouseman admits that in his capacity as such he received property from two persons as joint bailors, this involves the admission of their right to a joint recovery upon proof of a conversion. (p. 143.)

TROVER.—A Present Right of Possession at the Time of Conversion is Sufficient to support an action of trover. (p. 143.)

A BAILEE is Estopped from Denying the Title of His Bailors, no paramount title having intervened. (p. 143.)

JURY TRIAL—Instructions.—An Instruction may be Refused if It is but a Repetition of what has already been expressed in other instructions. (p. 144.)

DAMAGES—Conversion of Books.—The Measure of Damages for the conversion of books owned and held for personal use is the same as that of any other class of household effects so kept and held. (p. 144.)

WAREHOUSEMEN, Care Required of.—The Care Required of a Warehouseman is not Measured by the Care Usually Employed by Other Warehousemen in the vicinity, in keeping like property. (p. 144.)

APPELLATE PROCEDURE.—If the Amount Involved in an Error is Trifling Compared with the Whole Judgment, a new trial may be refused. (p. 145.)

WITNESSES—Mode of Interrogating.—If it is proposed to interrogate a witness without including in the question all the facts upon which he is to give an opinion, the court may decline to permit him to so testify. (p. 145.)

Robert L. Munger, for the appellant.

George E. Beers and Carl A. Mears, for the appellees.

343 PRENTICE, J. This action, to recover damages for the alleged conversion of certain household goods left in storage with the defendant as a warehouseman, has once already been before this court, when a new trial was awarded: 78 Conn. 198, 61 Atl. 363. Upon the retrial, it having appeared, as the defendant claimed, that some of the property in controversy belonged to the plaintiff husband in his own right, and some to the plaintiff wife in some right, and that the plaintiffs were married between 1849 and 1877, the defendant presented a number of elaborately drawn requests to charge the jury upon a variety of matters covering the field of the ownership of personal property by husband and wife intermarried during the period stated, and their rights to legal redress for the conversion of such property, all leading up to the general propositions that it was the duty of the plaintiffs to establish such a title as would warrant a judgment either in their joint names or in the individual name of one of them for such portion of the property described **344** in the complaint as might be shown to belong to him or her, and that this duty involved as a condition of recovery the particularization of the items belonging to each ownership and their value, and that if it should appear that one portion of the property belonged to the husband in his own right and another portion to the wife, either as her sole and separate estate or as her estate vesting in her husband as trustee, the defendant was entitled to a verdict. The court did not so charge.

Upon the trial the defendant offered evidence to show that the goods were received by it under a special verbal contract or arrangement which restricted its duty and limited its liability. All such evidence was excluded. Two requests to charge also dealt with this aspect of the case, the court having been asked to instruct the jury, in effect, that if certain assumed facts should be found a different liability would be imposed upon the defendant from that which the law imposes

upon warehousemen. The court refused to give such instructions.

The action of the court in these matters is made the subject of a number of reasons of appeal.

The plaintiffs, who are nowhere in the writ or pleadings described as husband and wife, alleged in their complaint, and the answer admitted, that the defendant was a warehouseman carrying on business in New Haven. They further alleged that they, being the owners thereof, delivered to the defendant as such warehouseman for storage the property in question. The answer in terms admitted this allegation, omitting therefrom the words "being the owners thereof." No special contract or arrangement was set up in the answer. The defendant thus stood upon the pleadings as admitting that it, in the capacity of warehouseman, was the bailee of the property, and that the plaintiffs were the joint bailors thereof. This admission involved an admission of the plaintiffs' right to a joint recovery in their action upon proof of the alleged conversion. It is a familiar principle that a bailor may sue his bailee for the latter's conversion of the thing bailed: 5 Cyc. 214, and ³⁴⁵ cases cited. The present right of possession at the time of conversion is sufficient to support an action of trover: *Ashmead v. Kellogg*, 23 Conn. 70. Ownership was therefore unnecessary to be alleged and as unnecessary to be proved. As bailee, the defendant was estopped from denying the title of its bailors, no paramount title having intervened: *Bigelow on Estoppel*, 2d ed., 385n; *The Idaho*, 93 U. S. 575, 23 L. ed. 978. The admission of a joint delivery by the plaintiffs carried with it the estoppel against a denial of the corresponding joint title, and a concession of a joint right of action if any there was.

The admissions of the answer, as they were unaccompanied by any averment of a special agreement or arrangement limiting the obligation which the defendant *prima facie* assumed as a confessed warehouseman in his relation to the plaintiffs, also carried with them the admission that its duty was that which the law attaches to the conceded relation. If it wished to avail itself of any such special contract or arrangement it was its duty to have pleaded it.

The defendant complains of the rule of damages which the court instructed the jury to apply, for the reasons (1) that the jury were not told, as requested, that to justify an award of damages under the special rule prescribed by this court

upon the former appeal of this case for the assessment of damages for the conversion of household goods and effects owned and kept for personal use, it must appear they were so owned and kept at the time of the alleged conversion, and (2) that the books which were included in the list of property claimed to have been converted were not, as requested, excluded from the operation of this special rule.

The special rule referred to was given to the jury in the language of this court, which expressly limited its application to household furniture and effects owned and kept for personal use. The jury could not have understood that the rule was one of wider application; and for the court to have added the statement which defendant's counsel in their request appended to their recital of the ³⁴⁶ rule would have been only to repeat what had already been expressed. The nonexclusion of the books from the application of the rule was plainly justified by the language of our former opinion, and was correct. The reason of the rule is as applicable to that class of household effects owned and kept for personal use as to any other.

The defendant further complains because the court refused to tell the jury, as requested, that the ordinary care which the defendant was required to exercise was "to be ascertained by the use of such care as is taken by other persons owning and keeping storage warehouses in the vicinity of the defendant's warehouse." This request did not embody a correct statement of the law, and was therefore properly refused: *Leach v. Beardslee*, 22 Conn. 404; *Smith v. Phipps*, 65 Conn. 302, 32 Atl. 367. The subject matter of the request was covered by the court in substantially correct instructions: *Stern v. Simons*, 77 Conn. 150, 58 Atl. 696.

All of the remaining matters embraced in the reasons of appeal which have been pursued in the defendant's brief relate to rulings upon the admission of testimony. In all, seventy-nine such rulings are made the basis of appeal. The correctness of not a few of these is the necessary corollary of our conclusions already expressed. Of the remainder a few only call for attention.

Among the articles enumerated in the schedule of property embodied in the complaint was some kitchen tinware valued at fifteen dollars. For the purpose of showing the condition of these articles before they were stored, the defendant offered a witness who had rented the house and household effects of the plaintiffs for a period of time. She was then asked a series

of questions which the defendant claimed for the purpose stated, and they were excluded. Had these rulings been incorrect, we should scarcely be justified in granting a new trial therefor, so trifling was the amount involved in them as compared with the judgment: *Old Saybrook v. Milford*, 76 Conn. 152, 56 Atl. 496. But an ³⁴⁷ examination of the questions shows that while certain of them might have been admitted in the exercise of a reasonable discretion, they all contained an element which made them technically objectionable and justified the rulings. The simple, direct and natural inquiry to elicit the witness' testimony as to the condition of the articles was not asked. Had it been, an answer would unquestionably have been admitted.

The defendant presented as a witness a dealer upon the installment plan in house furniture and furnishings. He was asked if he had been present in court during the trial and heard the evidence of Mrs. Baker and the other witnesses as to the condition, kind and quality of the furniture in question. Upon objection, an answer was claimed as introductory to another as to his opinion as to the value of the furniture, and "what it would cost to replace such furniture for the purpose for which it was used by" the plaintiffs. It is a sufficient answer to this claim of error to observe that it was proposed to interrogate the witness, without including in the questions the facts upon which he was to give his opinion. It is not error to decline to permit a witness to so testify: *Barber's Appeal*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

None of the remaining rulings involve any question of interest. We have examined them all, only to find that they are either intrinsically correct, within the domain of the court's reasonable discretion, or palpably harmless to the defendant.

There is no error.

In this opinion the other judges concurred.

The Conversion of Personal Property sufficient to sustain trover is the subject to a note to *Bolling v. Kirby*, 24 Am. St. Rep. 795. To sustain an action of trover, the right of property, general or special, and possession, or an immediate right of possession, must concur in the plaintiff, at the time of the conversion: *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52.

On the Estoppel of a Bailee to deny his bailors, see *Stephens v. Vaughan*, 4 J. J. Marsh. 206, 20 Am. Dec. 216; *King v. Richards*, 6 Whart. 418, 37 Am. Dec. 420; *Nudd v. Montanye*, 38 Wis. 511, 20 Am. Rep. 25; *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229.

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ALLEN v. RULAND.

[79 Conn. 405, 65 Atl. 138.]

A RELEASE of One of Several Joint Tort-feasors for a valuable consideration is a release of all. (pp. 149, 150.)

RELEASE, Evidence of.—If several persons are joint tort-feasors, and one of them pleads that the plaintiff has released the others, several different releases executed at different dates and differing as to the names of the persons released are all admissible in support of the plea. (p. 150.)

FALSE IMPRISONMENT.—Although the persons causing the confinement of another intend to secure a legal restraint only, and do not intend to have him confined without a legal commitment, they are liable if he was so confined. (p. 150.)

RELEASE.—Extrinsic Evidence is not Admissible to Control the Effect of a Written Release and make it different from what it appears to be on its face. (p. 150.)

RELEASE, General, Admissibility of.—The fact that the release offered in evidence was general, extending to all demands and not particularly describing the demand in question, does not affect its admissibility. (p. 150.)

RELEASE AND RECEIPT, Difference Between.—A receipt is evidence that an obligation has been discharged, but a release is a discharge of it. (p. 150.)

EVIDENCE, Parol to Vary Writing—Third Parties.—The rule that a written agreement cannot be varied by parol operates in favor of third persons as fully as in favor of the parties thereto. (p. 151.)

RELEASE.—The Amount of the Consideration Given for a Release is not material if it was accepted and regarded as sufficient by the person executing the release. (p. 151.)

JOINT TORT-FEASORS, Who are.—If two persons procure the illegal imprisonment of another, with and by third persons, the latter and the former are joint tort-feasors, and a release of the one from liability for the unlawful imprisonment releases all. (pp. 151, 152.)

Action for false imprisonment. The third defense pleaded that James H. and Edith Ward were joint tort-feasors with the defendants in the alleged seizure and detention of the plaintiff, and that the plaintiff had executed and delivered to the said James H. and Edith Ward, for a valuable consideration, a full release and discharge of the cause of action, and had thereby discharged the defendants from all claims for damages for said cause of action. A demurrer interposed to this plea was overruled, and a reply thereto then filed, denying the truth of such offense, and alleging that if any release exists between the plaintiff and James H. and Edith Ward, broad enough in its terms to cover this cause of action, it was given in satisfaction of other demands, and did not refer to, and was not intended to discharge, the present cause of action.

On the trial it appeared beyond dispute that the plaintiff had, for a time, been confined by the defendants in a sanitarium at Westport; that the plaintiff had a sister Ethel, who was the wife of James H. Ward, and that by attendants sent by Ward and wife, the plaintiff was taken to the defendants' sanitarium, and kept there, and restrained from 1896 to 1902, the sister, Mrs. Ward, taking charge of his financial affairs, and, from his money, paying the defendants for their services in keeping him confined and for certain extras furnished at his own request. There was also evidence that in 1896 the plaintiff had been pronounced insane by two physicians, who advised Mr. and Mrs. Ward that he should be placed under restraint, and that at her request the defendants, with Mr. Ward, took him to the sanitarium, and that in 1903, after his release, and after leaving the sanitarium, he had been paid two hundred dollars by an attorney acting for Mr. and Mrs. Ward, in full satisfaction of any money demand against them, and had given them a release reading as follows:

"To all to whom these presents shall come or may come—
Greeting:

"Know ye, that I, William S. V. Allen, for and in consideration of the sum of two hundred (\$200) dollars, lawful money of the United States, to me in hand paid by James H. Ward and Ethel V. Ward, have remised, released and forever discharged, and by these presents do for myself, my heirs, executors and administrators, remise, release, and forever discharge the said James H. Ward and Ethel V. Ward, their heirs, executors and administrators, of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or equity, which against them, or either of them I ever had, now have or which my heirs, executors or administrators hereafter can, shall, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents, excepting a claim as to certain personal effects, consisting of books, clothes and pictures alleged by me to be in the possession of Ethel V. Ward or James H. Ward, and which belong to me.

“In witness whereof, I have hereunto set my hand and seal, the 13th day of March, one thousand nine hundred and three.

“WM. S. V. ALLEN. [Seal]

“Sealed and delivered in presence of

“JOHN J. GRIFFIN.”

Also, that after a controversy arose between plaintiff and his sister respecting certain chattels, plaintiff gave to her and her husband a paper reading as follows:

“To all whom these presents shall come or may concern—
Greeting:

“Know ye, that I, William Sullivant Allen, also known as William S. Vanderbilt Allen, for and in consideration of the receipt of the articles described in Schedule A, hereto annexed and made a part hereof, and one dollar, lawful money of the United States, to me in hand paid by James H. Ward and Ethelinda V. Ward, have remised, released and forever discharged, and by these presents do for myself, my heirs, executors and administrators, remise, release and forever discharge the said James H. Ward and Ethelinda V. Ward and each of them, their and each of their heirs, executors and administrators of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, premises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law or in equity, which against them or either of them I ever had, now have, or which my heirs, executors or administrators hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents, excepting and excluding the following described articles belonging to me and which I assert are now in the possession of the said James H. Ward or Ethelinda V. Ward, or both of them: 1 silver-plated ‘cocktail’ shaker, 1 silver corkscrew, 1 pair silver wire-cutters, 1 silver pitcher, 1 glass pitcher, 1 glass decanter, 1 blue and white lamp, 2 silver spoons, 1 silver box, two or three statuettes.

"In witness whereof, I have hereunto set my hand and seal the 11th day of December, one thousand, nine hundred and three.

"W. S. V. ALLEN. [Seal]

"Sealed and delivered in the presence of

"JESSIE V. DUIGNAN."

The evidence also showed that Mrs. Ward delivered to the plaintiff the articles described in the schedule attached to the release, and also the excepted articles named in the release, and that all of these acts took place before the suit was brought. The admission in evidence of the releases was objected to by the plaintiff on the ground that "it had not appeared that Mrs. Ward or her husband was a joint tort-feasor with the defendant, in that the illegal confinement of the plaintiff was unknown to them, and could not have been contemplated by them as the probable result of their act in endeavoring to have the plaintiff removed from their house and restrained," and because it did not appear that the release was in fact given to discharge this particular cause of action, and because it did not appear that payment was made to the plaintiff in the transaction on account of which the release was given for the injury on account of which recovery was sought in this action.

The plaintiff, being called as a witness by the defendants, testified to the execution and delivery of the releases. On cross-examination by his counsel, he was asked if the releases were not given solely as the result of an accounting between him and his sister for certain moneys of his in her hands and for the personal property described in them, and if it was not agreed by parol when they were executed that they should not include the cause of action on which the present action was predicated. On objection, these questions were excluded, as were similar ones afterward put to him as a witness in rebuttal. Mrs. Ward was also placed upon the stand as a witness for the defense, and similar questions having been put to her on her cross-examination, were on like objection excluded. The court thereupon directed a verdict for the defendants under the third defense.

John C. Chamberlain, for the appellant.

Stiles Judson and Harry R. Sherwood, for the appellees.

⁴¹⁰ BALDWIN, J. The third defense upon its face was sufficient. A release of one of several joint trespassers, given

for a valuable consideration, is a release of all: *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154.

⁴¹¹ Each of the releases received in evidence was admissible to support this defense, notwithstanding the objections taken by the plaintiff. They differed in date, and in the name of one of the releasees, from that alleged, but no point was made on account of either of these variances. So far as the first objection taken is concerned, although the releasees intended to secure only a legal restraint of the plaintiff, and did not know that he was confined without any legal commitment, this, if he was so confined, would not exonerate them from liability to him as wrongdoers. It also went, and each of the other objections likewise, to the effect to be given to the releases by the triers, and not to their admissibility.

The reply to the third defense, after traversing it in one paragraph, in a second pleaded in avoidance that if any release was given which in terms was broad enough to cover the present cause of action, it did not in fact relate to and was not intended to discharge it. The defendant rejoined by denying the second paragraph. Evidence to support it was therefore admissible, if the issue raised by the rejoinder was not a wholly material one: *Adams v. Way*, 32 Conn. 160. But it was wholly immaterial. No extrinsic evidence of this nature could avail to make the releases anything but what they appeared to be upon their face.

The execution and delivery of each produced instantaneously a certain legal effect, provided its terms were given their natural meaning. This result could not be varied by parol proof that the parties did not intend them to be so interpreted, or even expressly agreed that they should have no such effect: *Drake v. Starks*, 45 Conn. 96; *New Idea Pattern Co. v. Whelan*, 75 Conn. 455, 53 Atl. 953. Each release was in its nature the final embodiment in written words of the agreement of the parties. Its dominant purpose was not to acknowledge the receipt of certain moneys or articles of property, but to state something done in consideration of their receipt. A receipt is evidence that an obligation has been discharged; ⁴¹² but a release is itself a discharge of it. A discharge is a fact, which cannot be explained away, as against anyone whose interests may have been affected by it. The rule that written agreements cannot be varied by parol operates in favor of those not parties to the instrument as fully as in favor of those who were parties to it, whenever it was executed by the latter

as the final embodiment of their agreement, and the parol evidence is offered to vary the legal effect of the terms in which it is expressed. The only purpose of such evidence can then be to give a new and unwarranted character to a past act: 4 Wigmore on Evidence, secs. 2425, 2432, 2446.

The defendants insist that they are to be regarded as in privity with Mr. and Mrs. Ward, by operation of law, and as such have more rights in opposing the introduction of parol evidence than if they were strangers to the release: See 1 Greenleaf on Evidence, secs. 189, 523; Crandall v. Gallup, 12 Conn. 365. We have no occasion to examine the validity of this claim, since, even if regarded as strangers to it, their rights in that respect were, in our view, sufficient to justify the rulings of the trial court.

The plaintiff cites *O'Shea v. New York etc. R. Co.*, 105 Fed. 559, 44 C. C. A. 601, in which, on a somewhat similar state of facts, a contrary conclusion was reached. The reasoning of the opinion in that case has been criticised as confused by a recent writer of authority (4 Wigmore on Evidence, sec. 2446), and it seems to us that the learned court may not have distinguished with sufficient clearness the right of a stranger to a written instrument to dispute the truth of its statements or recitals, from his right to dispute what is, as it reads, its effect in law.

Upon the execution and delivery of the first release, the liability of Mr. and Mrs. Ward for any unlawful confinement of the plaintiff previously procured by them, jointly or severally, was extinguished. The instrument was under seal, and it was also in fact given for a sum of money actually received. Whether this sum was large or small ⁴¹³ was immaterial, since the demand extinguished was wholly unliquidated. It was enough that the plaintiff accepted two hundred dollars as a sufficient consideration for whatever he surrendered: *Bull v. Bull*, 43 Conn. 455. That he did so accept it is incontrovertible from the language of the release. It is common to speak of the satisfaction of a claim, but the real meaning of the phrase is the satisfaction of the person who sets up the claim.

The undisputed evidence in the cause showed that, by their procurement, the plaintiff had been previously confined by the defendants, and that that confinement was the cause of action upon which he sued. The defendants had indeed offered evidence that the confinement was with the plaintiff's consent,

but he claimed otherwise and produced evidence to the contrary. His whole case was that he had been wrongfully imprisoned. By procuring the imprisonment Mr. and Mrs. Ward became, if it was wrongful, joint tort-feasors with the defendants, and equally responsible in damages to the plaintiff. The moment, therefore, that Mr. and Mrs. Ward were discharged from any claim of liability in this respect, the defendants were also discharged by operation of law.

It follows that the only proper course was pursued when the jury were directed to return a verdict in their favor: *McVeigh v. Ripley*, 77 Conn. 136, 58 Atl. 701.

There is no error.

In this opinion the other judges concurred.

The Release of One Joint Tort-feasor as the release of all is discussed in the notes to *Louisville etc. Mail Co. v. Barnes*, 111 Am. St. Rep. 281; *Abb v. Northern Pac. Ry. Co.*, 92 Am. St. Rep. 872.

Parol Evidence to Vary a Writing is the subject of a note to *Harris v. Murphy*, 56 Am. St. Rep. 659.

WYEMAN v. DEADY.

[79 Conn. 414, 65 Atl. 129.]

APPELLATE PROCEDURE.—The Decision of a Trial Judge Denying a New Trial will be sustained on appeal if it appears by the record that there was some evidence upon which the jury could reasonably have found the issue submitted to them in favor of the respondent, and could properly have awarded damages to the amount named in their verdict. (p. 154.)

CRIMINAL LAW.—To Deprive a Workman of Employment by Threatening and Intimidating His Employer is a criminal offense under a statute making it criminal to threaten or use any means to intimidate any person to compel him to do or abstain from doing, against his will, any act which he has a right to do or refrain from doing. (p. 154.)

EMPLOYMENT, Liability for Depriving Person of.—One who by threats and intimidations injures an employé by causing him to be discharged from his employment is liable to an action therefor. (pp. 154, 155.)

CONSPIRACY, Special Action for.—When an injury to an employé by causing his discharge results from a conspiracy, it is the wrongful act done in carrying out a concerted plan, and not the conspiracy itself, which furnishes the real ground for the special action. (p. 155.)

LABOR UNION and Its Agents, Joint Liability of, for Causing Loss of Employment.—Under an allegation of conspiracy between a labor union and its business delegate in causing the discharge of the plaintiff from his employment by threatening and intimidating his employer, and of malice on the part of the defendants, it is not necessary to prove either the conspiracy or the malice, if there is sufficient evidence to show that what the defendants did caused the discharge of the plaintiff by means of threats and intimidation. (p. 155.)

LABOR UNION and Its Business Agent or Walking Delegate, Evidence to Sustain Joint Recovery Against.—If the evidence tends to show, in an action against a labor union and its walking delegate, that he procured the discharge of the plaintiff from his employment, and that his acts were with the knowledge and approval of the union and also by its authority, a joint recovery against both may be sustained. (p. 155.)

LABOR UNION, Damages Against, for Causing Discharge of the Plaintiff are not Restricted to Wages Lost by Him.—In an action against a labor union and its walking delegate for procuring the discharge of the plaintiff by threatening and intimidating his employer, his damages are not restricted to the amount of wages lost by him prior to the commencement of the action. The jury may award punitive damages, or may find, if so alleged, that he was otherwise injured in his business than by loss of employment. (pp. 155, 156.)

Benedict M. Holden, for the appellants.

Walter S. Schutz and Stanley W. Edwards, for the appellee.

415 HALL, J. The amended complaint in this action contains substantially these allegations:

The plaintiff is a painter, decorator, and wood finisher, and as such has been in the employ of David R. and Frank M. Hawley, who are painters and contractors. The defendant, the Painters, Decorators and Paper Hangers of America, Local Union No. 481, a voluntary association located in Hartford, is a trade union whose proceedings are secret, and which is organized for the purpose of maintaining high rates of wages, reducing the hours of labor, preventing the employment of nonunion men, and similar purposes. The defendant Deady is a member of said association and its business agent or walking delegate. On or before the 25th of October, 1905, the defendants "maliciously and unlawfully conspired, combined, and confederated with each other and with other persons to the plaintiff unknown, to injure the plaintiff, and to prevent him from working at his trade, and from obtaining employment"; and on said day, "in pursuance of said conspiracy, willfully, and maliciously, and by means of threats and intimidations, induced the said David R. Hawley and Frank M. Hawley to discharge the plaintiff from their employ," and "because of the threats and intimidations of the

defendants," the said Hawleys on said day discharged the plaintiff from their employ. At that time the plaintiff was receiving wages at the rate of three dollars per day. Since his discharge he has been unable to obtain steady employment, and has thereby lost a large sum of money which he would otherwise have earned, and "has been greatly injured in ⁴¹⁶ his business and has been greatly damaged by the unlawful action of the defendants." The complaint is dated November 16, 1905, and claims fifteen hundred dollars damages.

The answer in effect denies the abovestated allegations of the complaint.

The jury rendered a verdict for the plaintiff for four hundred and twenty-five dollars damages.

The defendants filed a motion to set aside the verdict and for a new trial, upon the ground that it was against the evidence and that the damages awarded were excessive, which motion was denied by the trial court.

The denial of said motion is the only error assigned in the appeal.

The decision of the trial judge should be sustained if it appears from the printed record before us that there was some evidence upon which the jury could reasonably have found the issues submitted to them in favor of the plaintiff, and could properly have awarded him damages to the amount named in the verdict: *Birdseye's Appeal*, 77 Conn. 623, 60 Atl. 111.

The defendants contend that the record contains no evidence of the alleged conspiracy, nor of the alleged malice, at least upon the part of the union, nor of any authority of Dedy from the union to make the claimed threats; and that as it appears from the plaintiff's own testimony that he was unemployed but eighty-six days during the period between the day of his discharge and the date of the commencement of this action, and could have earned but three dollars a day, the damages recoverable could not have exceeded two hundred and fifty-eight dollars.

Section 1296 of the General Statutes makes it a criminal offense to threaten, or use any means to intimidate, any person to compel him to do or abstain from doing, against his will, any act which such person has a right to do. To deprive a workman of his employment by threatening and intimidating his employer is a criminal offense under this statute: *State*

v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 74, 8 Atl. 890. That one who by such means has so injured an employé ⁴¹⁷ would also be liable in damages in a civil action is not questioned in this action.

When such an injury results from the execution of a conspiracy it is the wrongful act done in carrying out the concerted plan, and not the conspiracy itself, which furnishes the real ground for a civil action: *Saville v. Roberts*, 1 Ld. Raym. 374; *Hutchins v. Hutchins*, 7 Hill, 104.

The gist, therefore, of the present action is not the alleged conspiracy, but the injury to the plaintiff caused by the unlawful acts of the defendants in procuring his discharge by threatening and intimidating his employers: *Bulkley v. Storer*, 2 Day, 531. To entitle the plaintiff to a verdict against both defendants, no further proof of a conspiracy was required than that they were joint tort-feasors in procuring the dismissal of the plaintiff by means of such threats and intimidation; and had the proof been that but one of the defendants so procured the discharge, the plaintiff, under General Statutes, section 760, would have been entitled to a verdict against that one.

Neither was it necessary for the plaintiff, to entitle him to a verdict under the allegations of the complaint, to prove any other malice than that which the law might imply from the unlawful act proved. The allegations of conspiracy and of malice contained in the complaint were neither of them essential to a sufficient statement of the plaintiff's cause of action. The former may be regarded either as an averment of a fact, the proof of which might aid the plaintiff in establishing a joint liability of the defendants, or, like the averment of malice, as an allegation of a fact in aggravation of the injury complained of: *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Garing v. Fraser*, 76 Me. 37.

Upon the question of whether the procurement of the plaintiff's discharge, by the means alleged, was the joint act of the defendants, the testimony of the plaintiff, of his said employers, of the defendant Deady and of other officers and members of the union, and the records of the doings ⁴¹⁸ at various meetings of the union, were presented in the trial court. It is not our purpose to repeat that evidence here. It is sufficient for us to say of it that the record shows that there was evidence before the jury from which, in our opinion, they might reasonably have concluded that the plaintiff was

discharged from his employment on account of the threats to his employers, and the means to intimidate them, made and used by the defendant Deady for the purpose of compelling the plaintiff's discharge; that Deady was the business agent and so-called walking delegate of the defendant union, and did said acts not only with the knowledge and approval, but by the authority, of the union. Such facts would render both defendants liable as joint tort-feasors.

The damages awarded are not necessarily excessive. Punitive damages might have been awarded even against the union, if it either directed Deady to do the particular acts complained of, or if it afterward approved them (*Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213, 42 Atl. 67); or the jury may have found, as alleged in the complaint, that the plaintiff was otherwise injured in his business than by the loss of employment during said period.

There is no error.

In this opinion the other judges concurred.

Actions for Inducing One to Break His Contract are discussed in the note to *Raymond v. Yarrington*, 97 Am. St. Rep. 923.

Where a Labor Union organizes and conducts a strike, through its officers, the organized entity or corporation can be reached and punished for the threats, intimidation, force and violence which flow from the unlawful acts which it instigates its members to commit: *Franklin Union No. 4 v. People*, 220 Ill. 355, 110 Am. St. Rep. 248. And the attempt of a labor union, by threats and fines, to coerce some of its members to vote for certain persons for a public office is a violation of law, whether such members had committed themselves to such voting or not: *Schneider v. Local Union No. 60*, 116 La. 270, 114 Am. St. Rep. 549.

GREEN v. BISSELL.

[79 Conn. 547, 65 Atl. 1056.]

CORPORATIONS—Dividends, When Treated as Income, and When as Capital.—Cash dividends are regarded as income passing to the life tenants, and stock dividends as capital inuring to the benefit of the remaindermen. (p. 159.)

CORPORATIONS.—The Declaration of a Stock Dividend Involves the creation and issuing of new stock. (p. 159.)

CORPORATIONS.—The Holding of the Respective Stockholders After the Issue of a Stock Dividend Bears the Same Relation to the outstanding shares as did previous holdings of each. (p. 159.)

CORPORATIONS.—A Cash Dividend is a Distribution to the Stockholders, as the reward of the corporate enterprise, of the profits or surplus assets of the corporation. The dividend is usually, but not necessarily, in cash. It may be in other property. (p. 159.)

CORPORATE STOCK, Distribution of, When Must be Regarded as a Cash Dividend.—The distribution among the shareholders of a corporation of shares of stock received in payment of indebtedness due to the corporation must be treated as cash and not as stock dividend, as income and not as capital, and as between tenants for life entitled to receive the income and remaindermen entitled to the capital, such dividend must be paid to the former. (p. 161.)

TRUSTEE, When Authorized to Convert Stock into Cash for Distribution as Income.—If a trustee under the duty of distributing as income cash dividends receives such dividend in the form of capital stock, he is authorized by sale to convert it into cash to enable him to make the required distribution. (p. 161.)

Suit to determine the right of beneficiaries under the will of Samuel Bissell. He died August 23, 1894, leaving a will giving the residue of his estate to trustees. They were given discretionary power as to the investment of the corpus of the fund and directed to dispose of the income and principal as follows: The testator's wife to have twelve hundred dollars per year, at the same rate for all parts of a year during her life, the trustees to pay to her such sum out of the net income, if it should be sufficient, and if not, then so much of the principal as was requisite. The payments were to be made yearly or oftener, as the widow should desire and the trustees found convenient. After one year from testator's decease, if there should be any excess of income over and above the annual payments to his wife and the expenses of the trust, such income should be divided among the children. One of these, Samuel Sherwood Bissell, was to share the division of the income only during his life. The trustees were further directed "to pay the same to my said children, provided there shall be such excess of income, as soon after the end of each year, except the first, as the amounts so to be paid can conveniently be ascertained." The trust was to terminate upon the death of Mrs. Bissell, and a final distribution of the fund was to be then made. The son, Samuel Sherwood Bissell, died April 2, 1906, leaving no wife nor issue. Catherine O'Donnell was made the executrix of his will and the sole legatee and devisee. The plaintiff Green was, at the bringing of the action, the sole trustee of the fund. Of the property of the trust were seventeen hundred and fifty shares of the capital stock of the Lounsbury & Bissell Company, a joint stock corporation, having a capital of eight

thousand shares of stock of the par value of twenty-five dollars each. On January 24, 1905, there were in the treasury of the corporation nine hundred and twenty-five of these shares which had been transferred to it by a stockholder in payment of a debt, and by vote of the stockholders and directors on that day, this stock was distributed to the stockholders pro rata "by way of stock dividend." After this distribution the company continued to have a considerable surplus, as the result of which two hundred and twenty-eight shares of stock and nineteen dollars and ninety-six cents as representing a fraction of a share passed to the trustee. On August 23, 1905, the plaintiff, having in his hands said two hundred and twenty-eight shares of stock, stated an annual account of the income found and paid to the parties entitled thereto the net balance as shown by the account, not, however, including any division of the said two hundred and twenty-eight shares. Subsequently and prior to the death of Samuel Sherwood Bissell, the plaintiff received as income from the trust fund two thousand eight hundred and forty-six dollars, which remains in his hands. On July 1, 1906, there became due as semi-annual interest upon certain bonds three hundred and twenty-five dollars, which was paid to the trustee. Five questions were propounded for the advice of the superior court, to wit:

"1. Whether any or all of the two hundred and twenty-eight shares of stock so received from the Lounsbury & Bissell Company, as herein mentioned, are principal or income.

"2. Whether the said Samuel Sherwood Bissell was, at the time of his decease, entitled to his share of so much of the net income which was earned at that time, after the previous settlement on August 23, 1905, and if so, how much, and when the same is to be paid.

"3. If any or all of said two hundred and twenty-eight shares of stock is held to be income, and cannot be divided equally, should the trustee sell said stock and divide the proceeds according to said will?

"4. Whether the said Samuel Sherwood Bissell was, at the time of the decease, entitled to his proportionate share of the interest on the Chicago, Milwaukee and St. Paul R. R. Co. bonds, due July 1, 1906, if the same is paid to the trustee, and if so, how much, and when the same is to be paid.

"5. If the court holds that said Samuel Sherwood Bissell was entitled to any income whatever, at the time of his

death, is such income to be chargeable with his proportion of the expenses incident to said trust, and if so, how much?"

Levi Warner, for the plaintiff.

Asa B. Woodward, for Fanny M. Bissell et al.

Joseph R. Taylor, for Catherine O'Donnell, executrix and individually.

551 PRENTICE, J. The accepted rule in this jurisdiction, applicable to all save possibly a few exceptional situations such as are not here revealed, is that cash dividends are to be regarded as income passing to life tenants, while stock dividends are to be treated as capital inuring to the benefit of the remainderman: *Smith v. Dana*, 77 Conn. 543, 107 Am. St. Rep. 51, 60 Atl. 117, 69 L. R. A. 76.

The declaration of a stock dividend involves the creation and issue of new shares of stock. The basis of the issue, in so far as payment into the corporation is not required of the recipient, is surplus assets, which thus become converted into strict capital with all which that implies. From the process there results an increase of both the number of outstanding shares and the amount of the corporate assets, which have had that peculiar dedication to the corporate uses which entitles them to the name of capital, strictly speaking: *Smith v. Dana*, 77 Conn. 543, 107 Am. St. Rep. 51, 60 Atl. 117, 69 L. R. A. 76. It is also one of the incidents of a stock dividend that the stockholder who receives his pro rata proportion of the new issue, while he acquires the ownership of more shares, adds nothing to his proportionate ownership of the assets of the corporation. His holding, after the new issue, bears precisely the same ratio to the total of the outstanding shares of the corporation as did his previous holding to the previous total: *Terry v. Eagle Lock Co.*, 47 Conn. 141.

The underlying idea of a cash dividend, on the other **552** hand, is the distribution to shareholders, as the rewards of the corporate enterprise, of a portion of the profits or surplus assets of the corporation. Usually the assets thus divided are in the form of cash and the distribution a cash one. This, however, is not necessarily so, and there is no departure in principle or essence if the distributed assets chance to be in some other form of property: *Leland v. Hayden*, 102 Mass. 542; *Allegheny v. Pittsburgh etc. R. Co.*, 179

Pa. 414, 36 Atl. 161; Olsen v. Homestead etc. Co., 87 Tex. 368, 28 S. W. 944; Scott v. Central R. & B. Co., 52 Barb. (N. Y.) 45; 2 Cook on Corporations, 5th ed., sec. 534. Whatever form the distribution takes, the result always is the reduction of both the corporate assets and surplus by just the amount of the distribution. Something is taken from the corporation and given to the shareholders. That which is distributed becomes released from all corporate control and comes under the dominion of the share owner.

The shares in contention here constituted no new issue. They had long been outstanding as paid-up stock. They were not issued in consideration of a capitalization of surplus. Their distribution did not increase either the number of outstanding shares or the amount of corporate capital. When the distribution was complete, each stockholder owned a larger proportion of the corporate assets than before. The ratio of his ownership of shares to the total number had been increased. Surplus assets had been taken from the corporation and given to the share owners. The corporate assets had thus become diminished and the shareholders' independent ownership increased. It is true that what was distributed was the shares of stock of the distributing corporation. But that was but an accident of the situation and an unimportant one. It was no more significant of the real character of the transaction than had it been the shares of some other corporation, or other property, or cash paid in in satisfaction of the original stockholder's debt in lieu of which the stock was obtained. The acquisition of this stock by the distributing corporation ⁵⁵³ was an incident of its business. As the result it became and was held as among its assets, and as such, and as helping to create a net surplus justifying a dividend, it was divided to the stockholders precisely as any other assets might have been. The distribution must therefore be treated as a cash and not as a stock dividend, as income, therefore, and not as capital. The fact that the stockholders and directors, in their votes authorizing and carrying into effect the distribution, misnamed it a stock dividend, cannot, of course, change its palpable character: Bulkeley v. Worthington Eccl. Soc., 78 Conn. 526, 63 Atl. 351.

The case of Leland v. Hayden, 102 Mass. 542, discloses a similar state of facts upon which a like conclusion was reached.

The duty of division and distribution which devolved upon the trustee by virtue of the income character of the fund which is comprised of these shares, and the lack of other assets in his hands possessing the same character, entitles him to make such a conversion of shares into cash as will enable him to perform that duty justly.

The provisions of the will creating the trust in question provide for annual accountings by the trustee of the income received by him during the preceding annual period, an appropriation, from each annual net balance so ascertained, of the sum of twelve hundred dollars to the widow, and thereupon the distribution of any remainder of such balance to the testator's children, including the deceased Samuel as long as he should survive, in fixed proportion between them. It is provided that the first of these accountings and apportionments shall be made at the expiration of one year from the testator's death, and that the succeeding ones shall be had as soon after the end of each year thereafter as they conveniently could be. The purpose and intention of the testator to make each year a distinct financial period, to reduce the gross income for that period into a net balance by deducting therefrom the expenses incident to the management of the trust, to charge thereon as far as possible ⁵⁵⁴ the annuity to the widow as one de anno in annum, and to divide any remaining sum to the children as a fund then for the first time come into being—is substantially as clear as was the somewhat similar intention of the testator in *Comstock v. Comstock*, 78 Conn. 606, 63 Atl. 449. The intention thus expressed was to give the children, not proportional parts of income generally, but rather proportional parts of an ascertained fund when that fund should from year to year be ascertained. This intention must govern.

This construction of the will necessarily precludes any claim on behalf of Samuel's estate to any share of the interest next after his death to become due upon the Chicago, Milwaukee and St. Paul bonds, as well as of any income which might come into the hands of the trustee after the last settlement on August 23, 1905, and prior to Samuel's decease.

The superior court is advised (1) that Catherine O'Donnell, as the executrix of the last will and testament of Samuel Sherwood Bissell, deceased, is entitled to receive from the plaintiff trustee one-eighth of the two hundred and twenty-

eight shares of the capital stock of the Lounsbury & Bissell Company set out in the complaint; (2) that to accomplish a just division and distribution of said shares among those entitled to receive them, the trustee is entitled to convert such a number of them into cash as will enable him to make such division and distribution; (3) that said Catherine O'Donnell, as such executrix, is not entitled to receive from said trustee any share of either any income which came into his hands after August 23, 1905, and prior to the death of Samuel Sherwood Bissell, or any interest which may have been paid after the death of said Samuel Sherwood Bissell upon any bonds held by said trust fund; and (4) to render judgment accordingly.

No costs in this court will be taxed in favor of either party.

In this opinion the other judges concurred.

DIVIDENDS AND THE RESPECTIVE INTERESTS OF TENANTS FOR LIFE AND REMAINDERMEN THEREIN.

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II. When is a Dividend a Cash Dividend—When a Stock Dividend.

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III. Rights of Life Tenants and Remaindermen.

a. Old Doctrine, 167.

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c. When Dividends Declared from Earnings Made Before Creation of Trust, 168.

I. General Remarks.

Dividends on corporate stock are generally designated by text-writers and the courts as being either "cash dividends" or "stock dividends," but to which of these classes certain dividends belong has perplexed the courts of both this country and England for a century. To the conflict of authority on this point is largely due, no doubt, the almost interminable litigation that has existed between tenants for life and remaindermen, in determining their relative rights in this class of property. The general rule which prevailed in England and was adopted by many of the American courts, that "cash dividends on corporate stock should be regarded as income, and go to the tenant for life, while a stock dividend should be regarded as capital, and pass to the remainderman," has been of little value to those interested, in the absence of any fixed rule declaring what is a cash dividend, and what is a stock dividend. It is elementary that the income of a trust fund belongs to the life tenant, but that the corpus belongs to the remainderman. But is a cash dividend to be considered as income only when it is payable in money,

or will a dividend, though payable in stock, certificates of indebtedness, or bonds, but which in fact represents profit, be treated as income, and, if so, is the question whether such dividend represents profit within the purview of judicial investigation? The courts of England and of some of the states, notably Massachusetts, declined to enter into an original inquiry regarding the source of a dividend, and established the simple, but purely arbitrary, rule above stated as applicable to all cases. This rule was generally referred to by our courts as the "Massachusetts doctrine." Other states, notably Pennsylvania, insisted that a dividend, though declared in stock, if it in fact represented earnings or profits, should be treated as income, i. e., a cash dividend, and go to the tenant for life, without regard to the corporate designation. This doctrine has generally been called the "Pennsylvania doctrine." The courts of this country have been almost evenly divided between these two doctrines up to a comparatively recent period, but, as will be seen hereafter, the decided weight of the late authorities, including Massachusetts itself, lean to the Pennsylvania doctrine, and the courts will, when necessary, determine by original inquiry whether a dividend designated by a corporation as a stock dividend should be regarded as income or capital. This would seem to be a more equitable way of determining the rights of tenants for life, and remaindermen, than the old arbitrary Massachusetts rule. But later on in this note it will be found that the supreme court of the United States in 1890, established a doctrine not entirely in accord with either the old Massachusetts or Pennsylvania doctrines, but that some of the leading state courts have refused to follow the ruling made by our highest judicial tribunal; so there is now a state court doctrine, and a United States court doctrine, and these will be treated separately.

II. When is a Dividend a Cash Dividend—When a Stock Dividend.

a. Doctrine of the State Courts.—If a dividend is payable in money in the usual course, and at stated periods of a corporation's existence, it is, of course, a cash dividend, and no further inquiry is necessary. But frequently dividends, though made from the net earnings or profits of a corporation, are declared in stock, certificates of indebtedness, or bonds, and designated by the corporation as "stock dividends"; or, if made in cash, are accompanied on the same day with a declaration that an increase of shares of the capital stock has been voted, and the dividend is apparently intended to be applied to the payment of such increase of shares. This latter method is not unusual where the corporation was created under the laws of a state which forbids the issuance of dividends in stock. It is the dividend not payable in money, or, if payable in money, declared under the circumstances last mentioned, that requires investigation. The early Massachusetts rule that "a cash dividend should be regarded as income and a stock dividend should be regarded as capital," without reference to the source from which it was declared, or the intention of the corporation

in declaring it, or its condition at the time, has been steadily adhered to by some of the state courts and the English courts: *Waterman v. Alden*, 42 Ill. App. 294; *Alsop v. De Koven*, 107 Ill. App. 190; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Chester v. Buffalo Cor. Mfg. Co.*, 70 App. Div. 443, 75 N. Y. Supp. 428; *In re Brown*, 14 R. I. 371, 51 Am. Rep. 379; *Green v. Smith*, 17 R. I. 28, 19 Atl. 1081; *Barclay v. Wainwright*, 13 Ves. 66; *Price v. Anderson*, 15 Sim. 473; *Johnson v. Johnson*, 15 Jur. 714; *Bouch v. Sproule*, L. R. 12 App. 385.

These decisions are based on the theory that the corporate designation of the dividend is controlling, and that the courts should decline to enter into inquiry to ascertain the source from which the dividend is declared. But the trend of the later decisions in many of the states, including the courts of Massachusetts itself, is to uphold the Pennsylvania doctrine, and follow the suggestion of Mr. Thompson in his commentaries on Corporations: "Instead of attempting to lay down a hard-and-fast rule on the subject, which shall be applicable to all cases—and herein lies the chief mistake the courts have made in dealing with it—it should be determined upon the consideration of the actual nature of the dividend in each particular case": 2 Thompson on Corporations, sec. 2192. Those courts sustaining this view contend that there is no substantial distinction between a dividend declared in stock and one paid in money, if both are based on a division of the earnings—that substance and not form should be recognized, and that the courts should, when necessary, make original inquiry in each case to ascertain the condition of the corporation when the dividend was declared, its intention in declaring it, and also the source from which it was declared, and if the dividend, though declared in stock, in fact represents profit, it is income, and not capital: *Millen v. Guerrard*, 67 Ga. 284, 44 Am. Rep. 720; *Hite's Devisees v. Hite's Exr.*, 93 Ky. 251, 40 Am. St. Rep. 189, 20 S. W. 778, 19 L. R. A. 173; *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565; *Daland v. Williams*, 101 Mass. 571; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; *Lyman v. Pratt*, 183 Mass. 58, 66 N. E. 423; *Lord v. Brooks*, 52 N. H. 72; *Van Doren v. Alden*, 19 N. J. Eq. 176, 97 Am. Dec. 650; *Ashurst v. Field's Admr.*, 26 N. J. Eq. 1; *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796; *Earp's Appeal*, 28 Pa. 368; *Moss' Appeal*, 83 Pa. 278, 24 Am. Rep. 164; *Biddle's Appeal*, 99 Pa. 278; *Vinton's Appeal*, 99 Pa. 434, 44 Am. Rep. 116; *Smith's Estate*, 140 Pa. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

In *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21, a bill was filed by the trustees under a will for instructions as to whether a dividend declared by a certain corporation was income or

capital. The stockholders had voted for an increase of the capital stock, and that the stockholders be entitled to subscribe in proportion to their number of shares if they paid within thirty days. On the same day the directors declared an extra dividend of twenty-five dollars per share. While there was no legal obligation on the part of the stockholders to purchase the stock, it was evidently the intention of the directors in declaring the dividend that they would do so, for the advisability of making a dividend in stock had been previously discussed by the directors, but they had been advised it was unlawful. The company had earnings sufficient to pay the dividend. The dividend was adjudged to be income and not capital. In *Doland v. Williams*, 101 Mass. 571, and *Rand v. Hubbell*, 115 Mass. 461, 23 Am. Rep. 121, the trustees had requested instructions under circumstances similar to those in the *Davis* case, and the dividend was declared to be capital and not income, but in these cases it appeared that the corporation had previously appropriated their profits to permanent improvements. These cases show that the courts of Massachusetts now look to the substance and nature of the dividend and the condition of the corporation when the dividend was declared, rather than the form or corporate designation of the dividend. This is further shown by the recent case of *Lyman v. Pratt*, 183 Mass. 58, 66 N. E. 423, where it is said: "In determining what is a cash dividend and what is a stock dividend, substance and not form is regarded."

Five of the latest and most leading cases of those above cited as sustaining this doctrine are those of *Hite's Devisees v. Hite's Exr.*, 93 Ky. 251, 40 Am. St. Rep. 189, 20 S. W. 778, *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565, 19 L. R. A. 173, *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230, *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796, and *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856. In each of these cases the question is treated at length and all former adjudications reviewed, and they are of especial significance because they refused to adopt the rule which had at that time been declared by the supreme court of the United States and which will be noted later. The facts in all of these cases brought them within the ruling made by the United States supreme court, but all followed the policy announced in the *McLouth* case, where, in referring to the ruling of the supreme court of the United States, it was announced that the decisions of that court "are not binding upon us except so far as they appear to be founded on reason and justice." The court in the *Hite* case, in holding a dividend declared in stock to be in fact a cash dividend, said: "Where a dividend, although declared in stock, is based upon the earnings of the company, it is in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profit. If it be not income, what is it?"

b. Doctrine of United States Supreme Court.—The rule laid down by this court for determining how a dividend shall be regarded is, that it must be determined entirely from the intention of the corporation when it is declared as expressed by its vote or resolution, and that the discretion thus exercised by the directors, in the absence of fraud or bad faith, is not the subject of judicial investigation.

A mother bequeathed two hundred and eighty shares of stock in a corporation in trust, directing that the dividends accruing thereon be paid to a certain named daughter "during her lifetime, without percentage of commission or diminution of principal," and that upon her death the shares should go to a certain other daughter. At the date of the testatrix's death the capital stock of the corporation was five hundred thousand dollars, but was afterward increased by act of Congress to one million dollars, and new shares were issued for the old ones and for the increase. The increase was made entirely from the net earnings, income and profits of the company, which accrued and were invested partly before and partly after the death of the testatrix. The resolution as to the increased stock was as follows: "Whereas the construction account of this company exceeds \$1,000,000 and as the capital stock of the company has been increased by act of Congress to \$1,000,000, therefore be it resolved, that the increased stock be awarded among the stockholders share for share as they stood on the 1st of October, 1868." The life tenant was awarded the income on the whole five hundred and sixty shares, but was refused a transfer of the two hundred and eighty increased shares of stock. Mr. Justice Gray, speaking for the court, said: "Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it as profits of its business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate and then invest them in its own works and plant, so as to secure and increase the permanent value of its property. Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole, and, unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts. Therefore, when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corpora-

tion as manifested by its vote or resolution, and ordinarily a dividend declared in stock is capital and a dividend in money is to be deemed income of each share." In refusing to allow the life tenant that portion of the new shares represented by earnings which accumulated before the creation of the trust, the court said it would be "contrary to all the authorities," and in refusing her that portion of the new shares represented by earnings which accumulated after the death of the testatrix, the court declared such action "would be to substitute the estimate of the court for the corporation, lawfully exercised through its directors, and would be open to the practical inconveniences already stated": *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, 34 L. ed. 525. This case, it will be seen, establishes a doctrine similar to the English rule, and with some modifications sustains the doctrine formerly maintained in Massachusetts, and since followed, as has been shown, by the courts of Illinois, Maine and Rhode Island.

III. Rights of Life Tenants and Remaindermen.

a. **Old Doctrine.**—A distinction was formerly made by the English courts as between a dividend in the usual course of a corporation's business, at stated times, and one which for prudential reasons was withheld, and that when declared, owing to its large amount and the irregular time of its declaration, it was designated as a bonus or extraordinary dividend. These bonuses or extraordinary dividends were considered as belonging to the corpus of the fund and reverted to the remainderman: *Brander v. Brander*, 4 Ves. Jr. 800; *Paris v. Paris*, 10 Ves. Jr. 185; *Clayton v. Gresham*, 10 Ves. Jr. 288; *Witt v. Steere*, 13 Ves. Jr. 363.

It was also asserted by some of the earlier courts in New York that any distribution of the earnings of a corporation, whether in stock or otherwise, should be regarded as a division of profits, and go to the tenant for life: *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 Barb. 637; *Goldsmith v. Swift*, 25 Hun, 201; *Riggs v. Cragg*, 26 Hun, 89. And the comparatively recent case of *Hite's Devisees v. Hite's Exr.*, 93 Ky. 267, 40 Am. St. Rep. 189, 20 S. W. 778, 19 L. R. A. 173, may also be construed as upholding this doctrine, but neither the old English nor the New York doctrines now prevail.

b. **Present Doctrine.**—When the question is settled as to whether a dividend is to be regarded as income or as capital—i. e., as a cash or a stock dividend—the respective rights of a life tenant and remainderman are easily determined, for the authorities of both England and of this country are practically unanimous in holding that all cash dividends or income which accrue from the earnings of a corporation, after the creation of the trust, belong to the tenant for life, and that all stock dividends or capital inure for the benefit of the remainderman: *Brimly v. Gron*, 50 Conn. 66, 47

Am. Rep. 618; *Green v. Bissell*, 29 Conn. 547, ante, p. 156, 65 Atl. 1056, 8 L. R. A., N. S., 1011; *Boardman v. Mansfield*, 29 Conn. 634, post, p. 178, 66 Atl. 169; *Millen v. Guerrard*, 67 Ga. 284, 44 Am. Rep. 720; *Waterman v. Alden*, 42 Ill. App. 294; *Alsop v. De Koven*, 107 Ill. App. 190; *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 810, 28 Atl. 565; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Daland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; *Lyman v. Pratt*, 183 Mass. 58, 66 N. E. 423; *Lord v. Brooks*, 52 N. H. 72; *Van Doren v. Alden*, 19 N. J. Eq. 176, 97 Am. Dec. 650; *Ashhurst v. Fields' Admr.*, 26 N. J. Eq. 1; *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796; *Earp's Appeal*, 28 Pa. 368; *Wiltbank's Appeal*, 64 Pa. 256, 3 Am. Rep. 585; *Moss' Appeal*, 83 Pa. 278, 24 Am. Rep. 164; *Biddle's Appeal*, 99 Pa. 278; *Vinton's Appeal*, 99 Pa. 434, 44 Am. Rep. 116; *Smith's Estate*, 140 Pa. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *In re Brown*, 14 R. I. 371, 51 Am. Rep. 397; *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856; *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, 34 L. ed. 525; *Price v. Anderson*, 15 Sim. 473; *Preston v. Melville*, 16 Sim. 163; *In re Barton's Trust*, L. R. 5 Eq. 238; *Bates v. McKinley*, 31 Beav. 280; *Johnson v. Johnson*, 15 Jur. 714; *Bouch v. Sproule*, L. R. 12 App. 385.

In *Sugden v. Alsbury*, 45 Ch. Div. 237, a recent English case; a dividend was declared and paid in money as a "dividend," a "bonus," a "special bonus," and an interim dividend partly from yearly profits and partly from a "reserve fund," and the life tenant was adjudged entitled to that part of the whole amount divided which was apportioned to him, and the fact that a portion of it was apportioned from the bonus and the reserve fund made no difference, thus showing that the old English doctrine as to bonuses has been abandoned.

c. When Dividends Declared from Earnings Made Before Creation of Trust.—The great weight of authority is to the effect that dividends declared in earnings made before the creation of the trust belong to the corpus of the estate and go to the remainderman: *Brimly v. Gron*, 50 Conn. 66, 47 Am. Rep. 618; *Thomas v. Gregg*, 78 Md. 545, 14 Am. St. Rep. 310, 28 Atl. 565; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Daland v. Williams*, 101 Mass. 571; *Ashhurst v. Field's Admr.*, 26 N. J. Eq. 1; *Ashhurst v. Potter*, 29 N. J. Eq. 625; *Earp's Appeal*, 28 Pa. 368; *Wiltbank's Appeal*, 64 Pa. 256, 3 Am. Rep. 585; *Moss' Appeal*, 83 Pa. 278, 24 Am. Rep. 164; *Biddle's Appeal*, 99 Pa. 278; *Vinton's Appeal*, 99 Pa. 434, 24 Am. Rep. 164; *Smith's Estate*, 140 Pa. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *Petition of Brown*, 14 R. I. 371, 51 Am. Rep. 397; *Green v. Smith*, 17 R. I.

28, 19 Atl. 1081; Cobb v. Fant, 36 S. C. 1, 14 S. E. 959; Pritchitt v. Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, 34 L. ed. 525; Paris v. Paris, 10 Ves. Jr. 188; In re Bouch, L. R. 12 App. 385.

SPERRY v. CONSOLIDATED RAILWAY COMPANY.

[79 Conn. 565, 65 Atl. 962.]

CARRIERS, Liability of for Baggage.—When a carrier does not take full possession of baggage and it remains under the control of the passenger, the former does not, in the absence of a special agreement, assume the common carrier's liability of an insurer, but becomes responsible only when it is shown to have failed in the exercise of reasonable care to protect from loss or injury such baggage or property as the passenger has the right to bring with him into the car. (p. 172.)

STREET RAILWAYS, Rules of Respecting Baggage.—Street railway companies may make reasonable regulations concerning the kind and size of baggage and packages which may be brought into cars by passengers. (p. 172.)

STREET RAILWAYS, When do not Assume the Custody of Baggage.—A conductor of a street railway who takes the baggage of a passenger when handed to him and places it within the sight and control of such passenger does not thereby assume the custody of the baggage so as to make his employer answerable therefor. (p. 172.)

STREET RAILWAYS—Negligence Respecting Baggage, When not Shown.—If the conductor of a street railway car, in assisting a passenger, takes his baggage and places it on the car in the sight of the passenger, the conductor does not assume the care or control thereof, and if a second conductor, not knowing to whom the baggage belongs, sees it taken away by a man who had been sitting near it, and makes no attempt to reclaim it, the street railway company is not guilty of any negligence respecting such baggage and is not answerable for its loss. (pp. 172, 173.)

Charles S. Hamilton, for the appellants.

Harry G. Day and William T. Hincks, for the appellees.

⁵⁶⁵ HALL, J. The complaint alleges that on the 20th of October, 1904, the plaintiff, Lillian M. Sperry, while a passenger ⁵⁶⁶ upon the defendants' street railway car, delivered to them, as common carriers, her satchel, which was her reasonable baggage, to be conveyed on said car; that the defendants accepted the same for said purpose, and took charge of it and placed it on such part of the car as suited their convenience; and that they so carelessly and negligently con-

ducted in taking care of and conveying said baggage, that through their negligence and carelessness it was lost.

The trial court finds that the evidence showing the following facts was uncontradicted:

At about 6 o'clock in the afternoon of October 20, 1904, the said Lillian M. Sperry, carrying her infant child, entered a street railway car of the Connecticut Railway and Lighting Company, one of the defendants, at Milford, to return to her home in New Haven. She was accompanied to the car by her sister, who carried the plaintiff's suit-case and who, immediately when the plaintiff had stepped upon the rear platform and had turned to enter the car, without getting onto the car herself and without saying anything, handed the suit-case to the conductor, who stood upon the rear platform. There were cross-seats in the middle of the car, with a narrow aisle between them, and on each end a seat on each side with a wider aisle between them. When the plaintiff entered the car she took one of the cross-seats near the middle of the car on the left-hand side, which seat was only wide enough for herself and child, and the conductor, on receiving the suit-case, placed it close to the forward end of the rear side seat on the left-hand side of the car, and against the first cross-seat on that side of the car. No one said anything to the plaintiff about where her baggage was placed or requested her to take charge of it. Once during the trip the plaintiff looked back and saw her suit-case where it had been deposited by said conductor. This conductor sometimes assisted passengers onto the cars by placing their bags or parcels in the cars.

The car was operated by a conductor and a motorman in the employ of the Connecticut Railway and Lighting ⁵⁶⁷ Company, to a point near Woodmont, and from that point to New Haven by the conductor and motorman of the Consolidated Railway Company.

When the change was made the first conductor said nothing to the second one about the suit-case, and the attention of the latter was in no way called to it at that time. Both conductors collected fare of the plaintiff at different points on the road.

The conductor of the Consolidated Railway Company shortly after taking charge of said car observed the suit-case standing where it had been placed by the first conductor, and also noticed an Italian of ordinarily respectable

appearance sitting on the side seat near the suit-case, and saw him take the suit-case with him when he left the car.

When the car reached the corner of Church and Chapel streets, where the plaintiff was to change cars, she first spoke to the conductor about her suit-case, and asked him where it was. The conductor then learned for the first time that it was hers. He told her he did not know where it was, but that a man had just left the car taking a bag with him. The conductor notified the superintendent of the loss, and personally endeavored by telephone to find the man and suit-case, but was unable to do so.

Upon the direction of the court the jury rendered a verdict in favor of the defendants.

To have entitled the plaintiff to a verdict it was necessary that there should have been sufficient evidence before the jury to justify them in finding, either that the defendants, or one of them, had accepted the baggage under a contract, express or implied, to carry and deliver it as common carriers, or that its loss was due to the negligence of the defendants, or one of them.

There was no evidence whatever of any express contract concerning the carriage of the suit-case, nor was there any evidence of facts which would have justified an implication that the defendants, or either of them, agreed to transport this baggage as common carriers.

There is nothing in the evidence to indicate that these ⁵⁶⁸ defendants ever held themselves out as undertaking to assume the care and control of, and to safely deliver, the baggage of the passengers upon their street-cars at any street corner at which they might wish to alight.

It is a matter of common knowledge that electric street passenger cars are never furnished, either in the manner in which they are constructed, or in the way in which they are operated, with facilities and means to enable the companies themselves to take into their custody and control the baggage of passengers. The well-known facts that there are in such cars no places for the separate storage of baggage, beyond the control of its owners, and that the duties of the conductor and motorman, who are the only agents of the company upon the cars, necessarily prevent them from taking charge of baggage, indicate that the companies do not assume control of such baggage as passengers may bring with them into such cars.

When the carrier does not take full possession of the baggage and it remains under the control of the passenger, the former, in the absence of special agreement, does not assume the common carrier's liability of an insurer, but becomes responsible only when it is shown that the carrier has failed to exercise reasonable care to protect from loss or injury such baggage or property as the passenger has the right to bring with him into the car: *Henderson v. Louisville & N. R. Co.*, 123 U. S. 61, 8 Sup. Ct. Rep. 60, 31 L. ed. 92; *Kingsley v. Lake Shore etc. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200; *Whicher v. Boston etc. R. Co.*, 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314; *Carpenter v. New York etc. R. Co.*, 124 N. Y. 53, 21 Am. St. Rep. 644, 26 N. E. 277, 11 L. R. A. 759; *Voss v. Wagner P. C. Co.*, 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010; 3 Am. & Eng. Ency. of Law, 2d ed., 547-582; 6 Cyc. 661. And in this state, street railway companies may make reasonable regulations concerning the kind and size of baggage and packages which may be brought into cars by passengers: Gen. Stats., sec. 3845.

In the present case the conductor was not requested to take the plaintiff's suit-case into his charge, and the fact that ⁵⁶⁹ he took it when it was handed to him and placed it in the car within the sight and control of the plaintiff, manifestly for the purpose of assisting her, would not justify the inference that he assumed the custody of it.

But the principal claim of the plaintiff is that the court should have submitted to the jury the question whether the defendants exercised reasonable care to prevent the loss of the suit-case. It is true that this is ordinarily a question of fact for the jury, but as in this case the evidence was clearly insufficient to sustain a verdict for the plaintiff upon that question, the court committed no error in not submitting it to the decision of the jury. There was no evidence of any breach of duty upon the part of either defendant, or of its employés. There was nothing for the jury to pass upon. Giving to the uncontradicted evidence respecting the performance by the defendants of their duties the only reasonable interpretation possible, it discloses these facts: The first conductor, to assist the plaintiff, carried her suit-case into the car when it was handed to him evidently for that purpose, and deposited it in a proper place where the plaintiff could, and in fact did, see it. Nothing was said or done which led or should have led him to believe that it was there-

after intrusted to his care. He had no reason to think the plaintiff could not watch it, so far as might be necessary, or that there was any danger of its being stolen; and there was no apparent reason why he should have notified the second conductor that the suit-case belonged to the plaintiff. When the second conductor observed the suit-case, he saw the Italian sitting near it, and there was no evidence to show that he was in any respect negligent in supposing, as he obviously did, that the Italian had a right to take it with him when he left the car.

These facts are clearly insufficient to justify a finding that the plaintiff's loss was occasioned by the negligence of the defendants, or either of them.

There is no error.

In this opinion the other judges concurred.

The Liability of Common Carriers for the Baggage of passengers is the subject of a note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 343. The general rule is that the retention of the custody and control of his baggage by a passenger relieves the carrier from responsibility for it: See the note to *Wood v. Maine Cent. Ry. Co.*, 99 Am. St. Rep. 374. And a passenger who, after his traveling bag is, in the daytime, placed in his section by the porter of a palace sleeping-car company, leaves such bag without attention for five hours, during which time it is stolen, cannot recover from the company: *Whicher v. Boston etc. R. R. Co.*, 176 Mass. 275, 79 Am. St. Rep. 314.

GENERAL HOSPITAL SOCIETY v. NEW HAVEN RENDERING COMPANY.

[79 Conn. 581, 65 Atl. 1065.]

EVIDENCE—Telephones, Conversations Over.—A conversation by telephone between an agent of the plaintiff at its office with a person in the office of the defendant, purporting to speak for it, is admissible against the defendant, though there is no evidence that the person speaking over the telephone was authorized to use it or to speak for the defendant, and where the person so speaking calls for an ambulance to take persons to the plaintiff's hospital and says that the defendant will pay for their treatment and care, this also is admissible. (p. 175.)

EVIDENCE, Presumption Against Error of Court in Admitting. If evidence is admissible for one purpose but inadmissible for another, it will be presumed to have been admitted only for the legitimate purpose. (p. 175.)

MASTER AND SERVANT, Liability of the Former for the Care and Medical Treatment of the Latter.—If, by an accident, employés of a corporation are injured and a message is sent by telephone from the office of the employer calling for an ambulance to take the injured persons to a hospital, and stating that the employer will be answerable to the hospital for the care of such persons, and, the ambulance being sent, they are taken to the hospital and there cared for until discharged recovered, the jury, or the court sitting as such, is justified in finding that the employer is liable to the hospital for the care and treatment of such employés. (pp. 177, 178.)

Action to recover for the support and treatment of employés of the defendant at the plaintiff's hospital. Verdict and judgment in favor of the plaintiff and appeal by the defendant.

Ernest L. Averill and Alexander Cumming, for the appellant.

John Q. Tilson and Thomas Hooker, Jr., for the appellee.

582 **HAMERSLEY, J.** The complaint alleges that the plaintiff furnished support and treatment in its hospital for two patients, at the request of the defendant, of the price and value of one hundred and sixty-two dollars; that this sum is justly due from the defendant to the plaintiff, and that the defendant has never paid the same. The answer is a general denial. The case was tried to the court.

While the plaintiff was putting in its evidence in chief it produced as a witness one Richard A. Mannel, who testified that he was in the plaintiff's employ and in charge of telephone calls at the hospital, and on June 1st, as agent of the hospital, received a telephone call purporting to be from the defendant company asking for the dispatch of an ambulance to the place of business of the defendant for two men who had been severely burned. The court found that the message was in fact sent from the office of the defendant.

This testimony was plainly admissible. A conversation by telephone between an agent of the plaintiff at its office. **583** with a person in the office of the defendant speaking for the defendant, unaccompanied by evidence that the person speaking for the defendant was authorized to use the defendant's telephone for the purpose of communicating messages from the office of the defendant, other than a presumption arising from the use of the defendant's telephone in the defendant's office and the course of business and experience necessarily involved in the use of this instru-

mentality for communication, is prima facie admissible for any purpose that a conversation with a person at the office of the defendant who is apparently in charge of the office as the defendant's representative would be admissible: *Rock Island & P. Ry. Co. v. Potter*, 36 Ill. App. 590; *Reed v. Burlington etc. Ry. Co.*, 72 Iowa, 166, 2 Am. St. Rep. 243, 33 N. W. 451; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49, 3 L. R. A. 539. The fact that a person in the defendant's office, apparently in charge as its representative, told the plaintiff to send an ambulance, as testified, is a fact relevant to the issues raised by the pleadings. The defendant, however, did not object to this testimony, and it was received by the court without objection.

The witness further testified that he asked who would pay for the treatment of these men, and was informed that the defendant would take care of the expense. The defendant objected to so much of the witness' testimony as stated the answer to the witness' question as to who would pay for the care of the injured men. The court overruled this objection and the defendant excepted. This ruling is assigned as error. The defendant states as grounds for this objection that the plaintiff had not established the identity of the person telephoning, or the place from which the telephone call came.

These grounds are sufficient. As we have seen, the mere fact that the identity of the person telephoning is not recognized does not necessarily exclude a conversation which is in itself admissible. The court finds that the call came from the office of the defendant, and even if evidence of this fact was not received until afterward, which does ⁵⁸⁴ not clearly appear, that is a matter subject to the discretion of the court: *Stirling v. Buckingham*, 46 Conn. 461, 463. But the main ground urged in support of the objection is that no evidence had been offered that the person telephoning was the agent of the defendant, and therefore a statement made out of court by that person that the defendant would pay for the care of the injured men was inadmissible. The objection thus stated is a general one to the admission of the evidence for all purposes, without specifying any. In such case if the evidence is admissible for one purpose but inadmissible for another, it will be presumed to have been received only for the legitimate purpose, in the absence of any finding to the contrary: *State v. Wadsworth*,

30 Conn. 55; *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 81, 8 Atl. 890; *Hurlbut v. McKone*, 55 Conn. 31, 3 Am. St. Rep. 17, 10 Atl. 164; *New England Mfg. Co. v. Starin*, 60 Conn. 369, 22 Atl. 953; *Starkey's Appeal*, 61 Conn. 199, 23 Atl. 1081. A statement by a person in the defendant's office, apparently having charge of the office as its representative, is a fact which, in connection with other facts, might tend to prove the liability of the defendant, not as evidence of a promise made by the defendant through its agent, but as one link in a chain of circumstances which establishes a liability in the defendant not founded on its direct promise. The finding indicates that the court admitted the evidence for this legitimate purpose, and its judgment plainly rests on a liability proved by such a chain of circumstances.

The only other error claimed is, that the facts appearing in the finding are so palpably inconsistent with the ultimate conclusion of fact reached by the court as to constitute an error in law. This claim is not very distinctly assigned as error, but perhaps it may fairly be regarded as included in the fourth assignment: "The court erred in finding that the person telephoning to the plaintiff had implied authority to act under the circumstances, and therefore the defendant was liable."

The facts indicated by the finding as supporting the ultimate ⁵⁸⁵ conclusion of the court are, in substance, these: The plaintiff is a corporation in the town of New Haven, established by the legislature as a charitable institution for the purpose of carrying on a state hospital; its funds were furnished from private benefactions and from the state's treasury; its members can have no pecuniary interest in its operation; its attending surgeons and physicians are by law required to give their services without compensation; its property to any amount necessary for charitable purposes is by law exempted from taxation; it receives an annual appropriation from the state of ten thousand dollars and by these private and public charities is enabled to care for its patients at a small charge. Of these facts the trial court had judicial knowledge: Gen. Stats., sec. 697; 1 Special Laws, p. 343; 7 Special Laws, pp. 507, 869; 14 Special Laws, pp. 309, 884. The defendant is a corporation located in the adjoining town of Orange, conducting there a hazardous business. On June 1, 1905, at the defendant's place of business in Orange,

two of its men were severely burned, so severely that one needed hospital care for nine days and the other for one hundred and fifty-one days. The officer representing the defendant in the conduct of its business at Orange was temporarily absent. The men were suffering, and in this emergency some one in the defendant's office undertook to act for the defendant, and asked, through the telephone, the plaintiff to dispatch an ambulance immediately to the defendant's place of business to convey two men, who had been severely burned, to the hospital, saying that the defendant would take care of the expense. In response to this summons the hospital ambulance was sent to the defendant's office, and the men were there found to be severely burned and suffering, and were taken immediately to the hospital. The defendant neither through its local manager nor otherwise disclaimed its liability, and took no steps to notify the plaintiff that it repudiated or desired to repudiate the act of the person who, in the emergency of the accident, had assumed to act for the defendant, until after both men were discharged 586 from the hospital. One man was discharged from the hospital in nine days and the other in one hundred and fifty-one days. After the first one was discharged the plaintiff presented to the defendant at its office a bill for his treatment; its representative did not then disclaim responsibility on the part of the company for the care of the men, but said that such matters were attended to at the main office at Boston, and that he would submit the matter to the Boston office. Upon the trial, after the plaintiff had produced its evidence in support of the foregoing facts, the defendant produced no evidence to prove who was in charge of its office and place of business in Orange at the time of the accident, and produced no evidence to prove that the person who, in the emergency of the accident and the suffering of the defendant's servants injured in its hazardous business, had assumed to act for the defendant was not clothed with authority to so act. The support, medical and surgical treatment, and nursing, furnished to the patients, was of the value of seven dollars a week, the sum charged at the hospital, and the support and treatment furnished were necessary and proper.

In view of these facts and all the inferences the court might properly draw from them in connection with the incidents of the trial, including the failure of the defendant

to either disavow knowledge of the sending of the message purporting to be from the company, or to disclaim the authority of the person sending it (Hull v. Douglass, 79 Conn. 266, 64 Atl. 351; Wilson v. Griswold, 79 Conn. 18, 63 Atl. 659), the court reached its ultimate conclusion of fact that the defendant had assumed as its own the assurance of its responsibility for the care of its servant, given from its office to the plaintiff and upon the faith of which the plaintiff had acted, and rendered judgment for the plaintiff.

It does not clearly appear from the finding that in drawing its inferences of fact the trial court has violated the plain rules of reason, or that any fact found is legally inconsistent with the conclusions reached: Owens Pottery ⁵⁸⁷ Co. v. Turnbull Co., 75 Conn. 628, 54 Atl. 1122; Hyde v. Mendel, 75 Conn. 140, 52 Atl. 744; Metcalf v. Central Vermont Ry. Co., 78 Conn. 614, 63 Atl. 633.

There is no error in the judgment of the city court.

In this opinion the other judges concurred.

A Conversation Over a Telephone is admissible in evidence, although the voice at the telephone is not identified: Godair v. Ham Nat. Bank, 225 Ill. 572, 116 Am. St. Rep. 172; Wolfe v. Missouri Pac. Ry. Co., 97 Mo. 473, 10 Am. St. Rep. 331; Young v. Seattle Transfer Co., 33 Wash. 225, 99 Am. St. Rep. 942; Shawyer v. Chamberlain, 113 Iowa, 742, 86 Am. St. Rep. 411, and cases cited in the cross-reference note thereto.

The Liability of an Employer to Pay for Medical Services rendered at his request to his injured employé is discussed in Spelman v. Gold Coin Min. etc. Co., 26 Mont. 76, 91 Am. St. Rep. 402; Chase v. Swift, 60 Neb. 696, 83 Am. St. Rep. 552; Cairo etc. R. R. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299.

BOARDMAN v. MANSFIELD.

[79 Conn. 634, 66 Atl. 169.]

LIFE TENANTS and Remaindermen, Interests of in Trust Funds.—Where funds of a specified value are subject to a trust in favor of life tenants and remaindermen, the former are not entitled to all that may have flowed from or accrued to the funds beyond their market value when received, and to have the existence and amount of the accretions determined upon the basis of such market value, when there have been changes in the form of the investment. (p. 181.)

LIFE TENANTS and Remaindermen, Interests of in Trust Funds, Restriction of the Former to the Income.—A will providing that a life tenant shall have the dividends, rents and profits of the trust funds gives no greater right than if it purported to bequeath the net income of such funds. (pp. 181, 182.)

WILLS—Testator, When Presumed to Employ Language in the Legal Sense of the Terms Used.—Though the meaning of the phraseology of a will respecting certain terms therein has not been judicially established in the state where the will was executed, yet if it has been established by decisions in other states, the testator, if he is a lawyer by profession, though a business man by practice, will be presumed to have used such terms with the purpose of accomplishing results judicially upheld by such decisions in the other states. (p. 182.)

WILLS, Construction of by the Aid of Subsequent Decisions.—Though the law upon a subject involving the construction of words employed in a will is not judicially determined in the state until after its execution, the declaration when made does not create the law, but merely declares the law previously existing, and the will must be read, interpreted and given effect pursuant to the law so declared. (p. 183.)

LIFE TENANTS and Remaindermen—Trust Funds.—A life tenant is not entitled to profits resulting from the sale or increase in value of securities constituting part of the trust fund. (p. 183.)

LIFE TENANTS and Remaindermen—Interests of in a Trust Fund Consisting of Stock in a Corporation.—Until there has been some action by the corporation setting apart from the body of its assets some portion of them to become the property of stockholders, there is nothing in existence to which the rights of the latter can attach otherwise than as it attaches to the corporate interests as a whole—nothing which can be regarded as partaking of the nature of profits from the corporate investment. (pp. 183, 184.)

LIFE TENANTS and Remaindermen, Interests of, in Corporate Stock.—Where new stock is authorized and the right to subscribe therefor is accorded to the stockholders pro rata, whether the issue is based solely upon surplus assets, or upon such assets in part and in part upon payment by stockholders, or solely upon subscription payments, the stockholders get nothing which was not before a part of the corporate property, or the stockholder sells his right, and his assignee steps into his place. In either event, the life tenant acquires no interest in such added stock, nor in the moneys received for the privilege of subscribing for it. (p. 185.)

Suit to determine conflicting claims to funds held by the trustee under the will of William H. Boardman, such suit being brought in the superior court and reserved by it for the advice of the supreme court. The decedent drafted and executed his will on March 19, 1870, and died August 27th of the year following. He left a widow, Lucy H. Boardman. The third item of his will was as follows:

“Item Third. I further give and devise to my executors hereinafter named, and the survivor of them, in trust, for the use and benefit of my dear wife, Lucy, during her natural

life, two hundred thousand dollars, to be taken from such part or parts of the property as I may own at my decease, not hereinbefore devised to her, as she, the said Lucy, may desire and select, at the appraisal in the inventory, the dividends, rents and profits to go to and belong to my beloved wife, to her sole and separate use during her natural life, with reversion over after her death to the uses and appointments set forth in my last will and in the codicils thereto, if any. My intention and object was and is to make abundant provision for the support and comfort of my dear wife by the three preceding items, in lieu of dower or share in my real or personal estate."

The widow and William J. Boardman, a nephew of the deceased, were named as executors, and both qualified and acted as executors and trustees until her death, after which the nephew acted alone.

In December, 1871, the widow, acting under the will, selected bonds and stock of the value of \$200,000 and made return thereof to the court of probate. The investments were changed from time to time, always remaining in dividend-paying or interest-bearing securities. The corporations whose stocks were included in the fund at various times issued new stock, which their stockholders were privileged to take pro rata upon prescribed terms. The rights of those acting as stockholders were in some instances sold and the proceeds added to the trust fund, and in other instances the privileges given were exercised and new stock carried to the fund. The widow during her life received the net proceeds of all cash dividends and of interest, but at her death the market value of the property in the fund had increased to \$327,683.07. During her life she claimed benefits from the fund not conceded to her by her cotrustee, and such claims were the basis of the present proceeding.

Henry Stoddard and Boardman Wright, for the remaindermen.

Burton Mansfield and James E. Wheeler, for the estate of the life tenant.

636 PRENTICE, J. The trust fund in question has always been comprised of personal estate, and of a kind which was either dividend paying or interest bearing. Mrs. Boardman, the life beneficiary, received from time to time during her

life the entire net income of the fund accruing from cash dividends upon stocks, and the interest upon all other investments. The executors of her will, hereinafter referred to as "the executors," pursuant to its provisions, now assert the right to have from the assets of the trust an amount or amounts in addition to those which she thus received in her lifetime.

The market value of the fund upon the termination of the life estate was \$127,683.07 in excess of its market value at the time of its creation. The major claim presented by the executors, which is comprehensive of all others, is for this amount. The contention thus made, it will be observed, is that the remainder interest is only entitled to have the fund kept intact to the extent of its original market value, and that the life tenant is entitled not only to have all else which may have flowed from or accrued to it, but ⁶³⁷ also to have both the existence and amount of its accretions determined upon the basis of market value, and that too, whether or not there have been changes in its investments.

It is manifest that this claim is in direct contradiction of the general principles governing the rights of life tenants and remaindermen in and to trust funds, which have been repeatedly affirmed and reaffirmed by this court, and that it cannot be supported unless there is something in the terms of the will creating the trust which takes it out of the operation of those accepted principles: *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618; *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; *Mills v. Britton*, 64 Conn. 4, 29 Atl. 231, 24 L. R. A. 536; *Smith v. Dana*, 77 Conn. 543, 107 Am. St. Rep. 51, 60 Atl. 117, 69 L. R. A. 76; *Boardman v. Boardman*, 78 Conn. 451, 62 Atl. 339; *Bulkeley v. Worthington Eccl. Soc.*, 78 Conn. 526, 63 Atl. 351; *Green v. Bissell*, 79 Conn. 547, ante, p. 156, 65 Atl. 1056, 8 L. R. A., N. S., 101. This is conceded. Two matters, however, are relied upon as indicating the direction of the testator that the general rule should be departed from in the present case, and that Mrs. Boardman's estate should have what is now claimed in its behalf, to wit: 1. The language of the will giving to her the "dividends, rents and profits" during her life; and 2. The presumed intent of the testator arising from certain circumstances in the light of which it is claimed that the will should be construed.

The words "dividends, rents and profits," upon which reliance is thus sought to be placed, are no more comprehensive,

as applied to personalty, than would have been "net income" used in their stead: *Guthrie v. Wheeler*, 51 Conn. 207; *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061; *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461. "Whether the testator makes use of the expression 'dividends,' or 'dividends and profits,' or 'dividends, interest, and profits,' or (as in this case) 'interest, dividends, profits, and proceeds,' I look upon all of them to come to the same thing, and that this is too nice a circumstance to found any distinction on": *Hooper v. Rossiter*, *McClell. (Eng. Ex.)* 527, 536.

The argument advanced by the executors in support of ⁶³⁸ the presumed intent, which they seek to bring to their aid in the construction of the will, is substantially as follows: In 1870, when Mr. Boardman made his will, drafted by himself, a lawyer by profession although a business man by practice, the courts of this state had not declared the law of this jurisdiction. Decisions, however, had been made in other states, including Pennsylvania, New York and New Jersey. These decisions in these states had been in consonance with the views now urged by the executors. One of the Pennsylvania decisions, rendered shortly before the execution of the will, involved the interests of the parties thereto in stock of the New Haven Gas Light Company, of which the testator was president, and of the New York and New Haven Railroad Company, with whose transactions he had been familiar for many years. It must therefore be presumed that he was familiar with these decisions, or with the latter one at least, and it ought to be presumed that he used the language of his will with the purpose of accomplishing the result thus judicially outlined. So it is said that ambiguous phrases in it should be interpreted in accordance with those principles of law which the testator most probably had in mind when he used them: See *Earp's Appeal*, 28 Pa. 368; *Wiltbank's Appeal*, 64 Pa. 256, 3 Am. Rep. 585; *Clarkson v. Clarkson*, 18 Barb. (N. Y.) 646; *Simpson v. Moore*, 30 Barb. 637; *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650.

Before assent were given to this argument, it would be wise to inquire whether any of the decisions referred to had in fact gone to the extent necessary to support the present claim, and to examine the foundation of the alleged presumption that the testator knew and acted upon the faith of them, and did not know and act upon the faith of, for example, *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, to discover

what of substance it possesses. Upon the first inquiry see *Moss' Appeal*, 83 Pa. 264, 24 Am. Rep. 164; *Smith's Estate*, 140 Pa. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *Thomson's Estate*, 153 Pa. 332, 26 Atl. 652, 653; *Graham's Estate*, 198 Pa. 216, 47 Atl. 1108; *Parker v. Johnson*, 37 N. J. Eq. 366; *Matter of Gerry*, 103 N. Y. 445, 9 N. E. 235. But we have no need to turn aside for any such purposes. It is enough that the language of the will creating the trust neither is, nor was when used, ambiguous or uncertain in meaning or effect. The more recent decisions which have declared the law of this jurisdiction as to the legal effect of certain language when used in creating a situation, and the legal consequences of a situation created, did not make that law. It was as much the law before as after them, and this Connecticut will must be read, interpreted and given legal effect pursuant to that law.

The executors present, in addition to the comprehensive claim thus far considered, certain subordinate ones, which when added together total said sum of \$127,683.07. The first of these is one to the profits, whether by sale or increase in valuation of the securities which have made up the fund, amounting it is said, to \$53,575.77. An adverse disposition of this claim is necessarily involved in our conclusions already stated.

Among the securities which the fund has held have been stocks of certain corporations which, during the period of the trust ownership, voted to increase their capitals and give to their shareholders the right to subscribe pro rata at par for the new shares. Some of the rights thus accruing to the fund were sold by the trustees for sums amounting to \$15,758.41; others were exercised and new stock taken by the trustees. From these transactions it is said that there were profits amounting to \$50,849.45. These two sums are now specifically claimed as belonging to the life tenant. The precise question thus presented was decided adversely to the contention of the executors in *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618, and the underlying principle there asserted has been consistently maintained through the line of subsequent cases already cited. That principle is, that until there has been some action by a corporation setting apart from the body of its assets some portion of them to become the property of its stockholders, and thus to pass out of the dominion of the corporation into that of ⁶⁴⁰ the stockholders, there is

nothing in existence to which the right of the latter can attach otherwise than as it attaches to the corporate interest as a whole—nothing which can as to them be regarded as partaking of the nature of profits from the corporate investment: *Green v. Bissell*, 79 Conn. 547, ante, p. 156, 8 L. R. A., N. S., 101, 65 Atl. 1056; *Bulkeley v. Worthington Eccl. Soc.*, 78 Conn. 526, 63 Atl. 351.

Applying this principle to situations where new stock is issued and the right to subscribe therefor is accorded to share owners pro rata, whether that issue be based solely upon surplus assets thus capitalized, or upon surplus assets in part and payments by subscribers in part, or wholly upon subscription payments, we find that it is always true that no asset of the corporation is set apart to become the share owner's. The corporation parts with nothing. The share owner gets nothing which was before a part of the corporate property. He not only gets nothing in the way of tangible property, but he gets nothing in the way of intangible value. All that he acquires is some evidence of his ownership in the corporation, for which he perhaps pays more or less, or perhaps pays nothing. If he receives new stock and pays nothing, as in case of a pure stock dividend, he owns no more and no less than he did before the transaction took place. He, to be sure, has more shares, but his proportionate interest in identically the same corporate assets remains unchanged. If he exercise his right to subscribe for his pro rata share, and pursuant to the terms of that right pays in to the corporation the full par value of his subscription, or some lesser sum supplementing a part payment from surplus assets thus capitalized, the result is again the ownership of more shares than before, but his total ownership represented by them forms a no greater proportion of the corporate assets than he formerly held, and those assets are precisely what they were, save as they have been increased by the subscription payments to which he has made his proportionate contribution. If the true book value of the shares of stock before the increase was more than par, that value after the increase ⁶⁴¹ becomes diminished by the fact that the surplus assets, which are incapable of appreciation, have to be distributed among a larger number of outstanding shares. So, if instead of exercising his right to subscribe, the stockholder sells it for its true value and his assignee steps into his place, the seller will, indeed, when the transaction has been closed, find himself with a sum of money

in his pocket which he can call his own, but the certificate of stock which has remained in his strong box, while bearing the same figures as formerly, will represent as much less of true value as is measured by the money received. It is true that the new conditions created by the stock issue may, for some artificial reasons, so appeal to investors or speculators as to influence market values so that they will not express the true situation, but that situation as revealed upon the books of the corporation will nevertheless exist, since it must remain as true of corporate management as of other things, that something cannot by human agency be created out of nothing. Of course there may be declared contemporaneously with a stock increase a cash dividend, the proceeds of which the recipient may if he chooses appropriate toward the satisfaction of his subscription obligation. This dividend may even be planned so that he may thus take advantage of it. But such dividend, if one in truth, would be an incident complete in itself and wholly independent of the stock issue transaction, and would not change that transaction's real character and consequences.

Whenever, therefore, as the result of a stock issue, of whatever form, nothing is by the corporation separated from the corporate assets to pass out, or which at the option of the share owner may pass out, from the dominion of the corporation into that of the share owners, no condition is created which permits of a life tenant receiving anything in hand which is not inevitably subtracted from that which, in the possession of the trustee, represents ownership in the corporation, and nothing else—from that, therefore, which under our law is the corpus of the trust estate. ⁶⁴² What the life tenant thus received would come from somewhere. It would not come from the corporation. It could only come from, or at the expense of, the fund held by the trustee before the transaction had its inception, and result in the fund's depletion as its consequence. The executors cannot, therefore, have either the proceeds of sale of, or profits derived from the utilization of, the rights under consideration.

In Massachusetts and Rhode Island, where views upon the general subject of the rights of life tenants and remaindermen similar to those held by us are entertained, similar conclusions upon the incidental question now under discussion have been reached: *Atkins v. Albree*, 94 Mass. (12 Allen) 359; *Daland v. Williams*, 101 Mass. 571; *Rand v. Hubbell*, 115 Mass. 461,

15 Am. Rep. 121; Brown, Petitioner, 14 R. I. 371, 51 Am. Rep. 397; Green v. Smith, 17 R. I. 28, 19 Atl. 1081.

The inequity of any other conclusion has led courts holding other views than ours upon the general subject of the rights of life tenants to agree that the ownership of rights such as are under consideration attaches to the corpus of trust funds: Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 164; Biddle's Appeal, 99 Pa. 278; Eisner's Estate, 175 Pa. 143, 34 Atl. 577; Walker v. Walker, 68 N. H. 407, 39 Atl. 432; In re Kernochan, 104 N. Y. 618, 11 N. E. 149; Hite's Devisees v. Hite's Exr., 93 Ky. 257, 40 Am. St. Rep. 189, 20 S. W. 778, 19 L. R. A. 173. See to the same effect DeKoven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587; Bouch v. Sproule, L. R. 12 App. 385; In re Barton's Trusts, 17 L. T., N. S., 594.

In three instances there were new issues of stock, according to the terms of which the stockholders were permitted to have their pro rata share upon the payment of less than the par value thereof. The balance was made up out of the surplus of the corporation. In one case the vote was in substance to appropriate from the undivided profits or surplus for this purpose \$25 for each new share of stock; in another that each subscriber be credited \$10 per share out of the surplus; and in the third that each stockholder be credited with a dividend, from the surplus, of \$18.75 on ⁶⁴³ each share of the new stock. The amounts so appropriated or applied, being in the whole \$7,499.44, are made the subject of the final claim by the executors. The answer to the question thus presented is involved in the discussion already had, unless it be that the sums under consideration are to be regarded as cash dividends. It will be noticed that in no one of the three cases was the stockholder entitled to receive anything in hand. He was given no option to receive a dollar. Whatever form of words was used, the only thing which could result was a capitalization of surplus to the extent of the appropriations or credits allowed. No asset could by any possibility pass out from the control of the corporation; some were to be given a new character, but all were to be retained in the corporation.

The superior court is advised that no one of the claims presented by the executors of the last will and testament of Mrs. Lucy H. Boardman, deceased, to a share of the trust fund now in the hands of William J. Boardman, trustee, is well founded; that all of said fund as it was constituted at

the death of said Lucy H. Boardman belonged to the corpus thereof, and that judgment be rendered accordingly.

No costs in this court will be taxed in favor of either party.

In this opinion the other judges concurred.

On What are Cash and What are Stock Dividends, and the respective interests therein of life tenants and remaindermen, see the note to *Green v. Bissell*, ante, p. 156.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

HALL v. NIEUKIRK.

[12 Idaho, 33, 85 Pac. 485.]

CORPORATIONS—Receiver, When may be Appointed for.—
On a complaint by stockholders in a corporation showing that the president and directors in charge thereof are incompetent to manage its business, and have entered into a conspiracy to loot it of its profits, and are mismanaging it, and running it into indebtedness and insolvency, a receiver should be appointed. (p. 195.)

CORPORATIONS—Receivers.—A Court Has Jurisdiction to Appoint a Receiver of a Corporation pendente lite. (p. 196.)

E. M. Wolfe and E. J. Dockery, for the appellants.

W. C. Howie, for the respondents.

37 SULLIVAN, J. This is an appeal from the order of the judge of the fourth judicial district court denying the application of the appellants for the appointment of a receiver for the Charles R. Kelsey Company, Limited, a corporation organized under the laws of the state of Idaho, and doing a general merchandising business in Elmore county. The application was based on the amended complaint in the action. All of the allegations of that complaint were admitted by the respondents, as they did not by answer or otherwise deny any of them at the time said application for a receiver was presented and passed upon by the judge. Among many of the allegations of the complaint we find the following: That Charles R. Kelsey, on or about February 1, 1901, owned and operated a general merchandise store in Mountain-home, said county, and that on or about said day was organized the defendant corporation; that the appellants were inexperienced in the merchandising business and that said Kel-

sey represented to them that his merchandising house was doing a prosperous business and that the new corporation would make large profits, and guaranteed to the plaintiffs or to the appellants, and to all owners of preferred stock an annual dividend of ten per cent, and to that end he caused the stock of said corporation ³⁸ to be issued in preferred and common, \$25,000 of each. All of the preferred stock he sold to plaintiffs and others, who paid cash therefor; that plaintiffs were led to believe that said preferred stock would receive a ten per cent dividend which would be paid semi-annually, but as a matter of fact said articles of incorporation guaranteed said dividends only out of the profits of the business before the common stock should share in any part thereof; that only three semi-annual dividends had been paid and that no dividends whatever had been paid on said preferred stock since August, 1902; that in fixing the value of the store and general assets of said Kelsey which went to make up the property transferred to said corporation, there was considered and valued a large number and amount of open accounts to said Kelsey, and he guaranteed said accounts should be paid within one year after the incorporation of the said company, and as security for such guaranty it was agreed that \$15,000 of the common stock should remain and be the property of the corporation and should not be delivered to said Kelsey or to any other person until all of said open accounts should be paid to said corporation; that thereafter a considerable part of said accounts were paid, and by proper resolution of the board of directors of said corporation, the president and secretary were directed to issue to said Kelsey \$10,000 worth of the common stock and to retain as the property of the company the remaining \$5,000 worth of common stock; that at that time said Kelsey was president of the company, and instead of issuing \$10,000 as directed, he caused to be issued \$5,000 additional of the said common stock, thus defrauding the plaintiffs out of said common stock; that there is yet due and unpaid a large amount upon said open accounts so guaranteed by Kelsey; that thereafter said Kelsey transferred said \$5,000 worth of common stock so fraudulently issued to him to his wife Altha B., who took the same with full knowledge that said stock was fraudulently issued; that on or about the twenty-fourth day of June, 1904, said Kelsey died, and that on or about the ninth day of July, 1904, the defendant, J. W. Nieukirk, was elected president of the said

³⁹ company to succeed the deceased; that he was elected in opposition to the votes of the plaintiffs who were members of the board of directors; that said Nieukirk is a practicing physician and is wholly unacquainted with the mercantile business; that he was a particular friend of the said Kelsey, deceased, and his wife, and was their family physician, and that he always sustained them at the meetings of the stockholders and of the directors of said corporation; that among the duties of the secretary and treasurer is that of preparing every month for the regular monthly meeting of the board of directors a statement in writing showing the present financial condition of the company, the business transacted during the preceding month, the cash taken in and paid out and the amount due and owing to the company; that said Nieukirk has refused to allow the secretary and treasurer to prepare and present to said board the said monthly reports, although the same has often been requested by the board of directors; that on the seventeenth day of November, 1904, the directors, believing that it was for the best interest of the company and stockholders, ordered and directed an inventory of the property of said company to be taken so that they might know how the company stood financially, and for that purpose they employed one Wilterding, an experienced merchant, whereupon defendant Nieukirk then and there refused to allow him or any person to make an appraisement of the company's property; that said Nieukirk, Altha B. and Altha R. Kelsey and George C. Nichols have conspired together for the purpose of defrauding said corporation and the plaintiffs herein and other stockholders, and in furtherance of said conspiracy and fraud said Nieukirk has refused to preside over the regular monthly meetings of the board of directors, although personally present; that he failed to entertain motions made for the purpose of adjourning such meetings; that he has left meetings of the board for the purpose of reducing the number so that there would be no quorum present, thereby forcing an adjournment; that at various meetings of said board he has become very offensive, abusive and insulting to the members ⁴⁰ of the board; that he is at enmity with every member of the board, except the two Kelseys and Nichols; that on the seventeenth day of December, 1904, while the board of directors was in session in the company's store building, they requested their counsel to appear before them, for the purpose of counseling and advising them, whereupon said Nieukirk

refused to allow said counsel to enter the building, declaring that he would put him out by force and violence if he attempted to enter; that he refused to abide by their instructions or to carry out their orders; that he manages and operates the business of the said company in the interest of himself and of the said Kelsey's family to the exclusion of the other stockholders; that he draws from the funds of said company the sum of \$150 per month for his said services, which instead of being a benefit are an injury to the company because of his inexperience and misconduct; that he employs the Kelsey family in said store; that the office help alone consists of four persons at a monthly cost of \$500; that in the sales department he employs four persons at a monthly salary of \$450; that in the delivery department he employs a man and a boy at a monthly cost of \$100; that the work of the office, including the superintending of the buying, can be done by two persons, at a cost not to exceed \$175 monthly, and that for the five months next preceding the election of said Nieukirk as president, the office force consisted of two persons for three months at a salary of \$150; and for two months at a salary of \$185; that the total cost of help for said company should not exceed \$550; that the board of directors have often directed that the purchases of the company should be made on a cash basis. Notwithstanding the repeated orders of the board to that effect, at the close of the year ending January 31, 1904, the said Kelsey, deceased, had so managed the company's business that it was indebted to wholesale houses and firms in the sum of \$16,000, all of which was overdue; that said Kelsey and Nieukirk urged the board of directors to consolidate the indebtedness of the company and place it with one bank or person and that the time for payment thereof⁴¹ be extended; that in so doing the finances of the company would be in such condition that all purchases thereafter could be made for cash and all bills discounted, thereby making a great saving to the company. Relying upon such representations the appellants joined with the defendants in an order directing said Kelsey to secure a loan of \$16,000; that thereafter said Kelsey became ill and unable to attend to said matter, and that said Nieukirk and others negotiated a loan of \$16,000, which loan was secured by mortgage on the company's property; that said loan was to be paid monthly in payments of \$1,000; that four of said monthly payments only had been made; that all other of said monthly payments

are now past due and remain unpaid; that said Nieukirk, instead of conducting said business upon a cash basis in the purchase of goods, has so managed and conducted the business that said company now owes \$11,000 for goods purchased, which amount is overdue; that said Nieukirk and Altha B. Kelsey, in furtherance of the conspiracy, transferred to Altha R. Kelsey, daughter of Altha B., without consideration, a number of the shares of the capital stock of said company and so transferred to the said George Nichols five shares of the capital stock thereof; that said transfers were made for the sole and only purpose of enabling said Kelsey and Nichols to become directors of said company that they might assist Nieukirk and Altha B. Kelsey in said conspiracy; that at the annual meeting of the stockholders on the 16th of January, 1905, the plaintiffs and Altha B. Kelsey were elected directors of said company, but that said Nieukirk, Altha B. and Altha R. Kelsey and Nichols, in furtherance of said conspiracy and after said election and without further ballots being taken, during a recess of said meeting and in pursuance of said conspiracy, did fraudulently and unlawfully remove four of the ballots which had been cast prior to said recess, and in their place substituted other ballots and that said ballots were counted by said defendants on the accumulated plan; that by reason of said fraudulent change of said ballots the defendants, Nieukirk, Kelseys, and Nichols, were declared ⁴² elected as directors of said company in fraud of said company and of the rights of plaintiffs. That after said fraudulent election the four persons mentioned elected said Nieukirk president, Altha B. Kelsey vice-president and George C. Nichols, secretary and treasurer, of said corporation; that no meeting of the board of directors has been held since the annual meeting of January, 1905; that no monthly statement of the financial condition of the company has been rendered since said annual meeting, and none was made at that time and that said defendants had refused to make such report, in violation of the by-laws of the company. That Nieukirk had taken from said company the sum of \$1,800 for one year's service as president of the company; that said fraudulently elected officers have conspired together to defraud the appellants and other stockholders of any and all profits of said business, and have fraudulently denied the plaintiffs and other stockholders from all knowledge or participation in the conduct of such business; that in furtherance of such conspiracy

said defendants have paid to themselves and their favorites salaries way beyond the value of the services rendered by them to the said company, in order to consume the profits and substance of the said company; that while the business of the said company now and for several months last past is less than one-third of the business done by said company before the incompetent management of Nieukirk and the other defendants, they have continued to employ an unnecessary force to conduct the business of said company, and have increased the salaries of the said Kelseys and Nichols, and that the affairs of the company have been so recklessly, fraudulently and incompetently managed that the salary expense thereof ranges from \$722 to \$959 per month, and that the total expense of conducting the business is from \$1,100 to \$1,500 per month, and that the average monthly sales do not exceed \$5,000 per month; that to give the impression of doing a large business, credit is indiscriminately extended to people of little or no financial responsibility, and accounts of long standing are left uncollected so that about two-thirds of the total outstanding ⁴³ bills of said company, aggregating upward of \$20,000, are uncollectible, and that said misconduct, mismanagement and extravagance in the affairs of said company are deliberately and intentionally made on the part of said Nieukirk, and in furtherance of a purpose and conspiracy to divert the funds and apply the assets to their own benefit, whereby plaintiffs are defrauded, and the said company is in imminent danger of becoming insolvent if it is not in fact already so; that said \$5,000 of common stock was to become the property of the stockholders in the event Kelsey failed to collect or pay outstanding accounts, aggregating over \$2,300, and that said stock was fraudulently issued by said Kelsey and assigned to the defendant Altha B. Kelsey, and that said accounts have not been collected and have been fraudulently charged to the account of said C. R. Kelsey months after his death, and that the same were uncollectible from his estate and that said accounts were so charged for the purpose of consummating the conspiracy to defraud plaintiffs and said stockholders of the \$5,000 worth of common stock; that on October 31, 1904, said Altha B. Kelsey owed said company the sum of \$758.14 on account, and had the same transferred to the account of C. R. Kelsey, deceased; that said transfer was caused to be made by the said Nieukirk, Kelseys and Nichols with the full knowledge that said C. R. Kelsey

was dead and had left no estate, and that said account was utterly worthless as an account against his said estate; that said transfer was made expressly for defrauding plaintiffs and other stockholders out of said sum of \$758.14; that said Altha B. Kelsey now disclaims said debt and obligation and refuses to pay the same; that no redress can be obtained by plaintiffs in an action in the name of the corporation, as its officers and directors are parties to and direct beneficiaries of the fraud practiced upon plaintiffs, and they neglect and refuse to require said Altha B. Kelsey to pay said sum or any part hereof or to require her to assign and transfer to the company said \$5,000 worth of common stock so fraudulently acquired by her; that prior to the organization of the said corporation, ⁴⁴ as an inducement and protection to the owners and holders of the said preferred stock, it was understood and agreed by and between them and all owners of stock that the holders of preferred stock should have the privilege, power and authority to elect the secretary and treasurer and to fix his salary, and to that end a by-law was adopted as follows: "The office of secretary and the office of treasurer may be held by the same person, both offices to be filled and the salary fixed by a majority vote of the preferred stockholders at the time of the stockholders' annual meeting. He or they shall hold the office for one year. In case of a vacancy by resignation, disqualification or removal, the vacancy is to be filled in the same manner as the election."

That at the annual meeting of the stockholders in January, 1905, Nieukirk, Kelseys, and Nichols, representing all the common stock and a very small minority of the preferred stock, against the will, and without the authority or consent of the holders of the majority of the preferred stock, in furtherance of said conspiracy and in fraud of plaintiffs, so amended said by-law as to deprive the holders of preferred stock from so selecting the secretary and treasurer, and that under such amended by-law, and in pursuance of the fraudulent purpose aforesaid, voted for and elected or pretended to elect said Nichols secretary and treasurer, and thereafter employed him as a bookkeeper at a salary of \$100 per month; that on account of the unfriendly feeling existing between Nieukirk and the board of directors caused by the mismanagement and misconduct of the said Nieukirk, Kelseys and Nichols, and because of the inexperience of said Nieukirk and his extravagant management in the conduct of the said business, the

capital stock of said company is becoming impaired and endangered, and that said corporation is in imminent danger of insolvency and unless protected by order of the court will become entirely valueless; that plaintiff has no plain, speedy and adequate remedy at law.

The foregoing is the substance of the allegations of the complaint, none of which are denied by the respondents. That⁴⁵ being true, we think the allegations amply sufficient to warrant the court in appointing a receiver. The utter incompetency of Nieukirk is shown. A conspiracy is shown to exist between him and other of the directors to loot said corporation of all its profits in the mercantile business and of the profits of the company. Under his management large debts have accrued against the company and contrary to the order of the board of directors. Salaries of the officers and of the employés have been increased and the employés not required by the business retained on the pay-roll. The business of the company has decreased from \$15,000 a month to about \$5,000. Credit has been indiscriminately given to the amount of about \$20,000, much of which is absolutely worthless. Stock that belonged to said company has been fraudulently issued to the Kelsey family. A good account of \$758.14 against Altha B. Kelsey has been transferred against a deceased man who left no estate, in fraud of the rights of the stockholders. It appears that money was paid for the preferred stock, and a by-law was adopted giving the stockholders holding the preferred stock the right to elect the secretary and treasurer. This was fraudulently amended by said Nieukirk and his co-conspirators so as to permit the secretary and treasurer to be elected by themselves and against the interests of the stockholders who held the preferred stock, and it is admitted that if said corporation is not already insolvent, that insolvency stares it in the face. Notwithstanding all of those undenied allegations, it is contended by counsel for respondents that sufficient is not alleged to warrant a court of equity in granting a receiver, and that the appellants have a plain, speedy and adequate remedy at law. If the complaint does not contain allegations sufficient to warrant the appointment of a receiver, it would be most difficult to make allegations sufficient for that purpose. Under the provisions of subdivisions 5 and 6 of section 4329 of the Revised Statutes, the appointment of a receiver is authorized where a corporation is insolvent or in imminent danger of insolvency, and also in all other cases where

receivers have heretofore been appointed by the usages of ⁴⁶ courts of equity. The allegations are amply sufficient to show that said corporation is grossly mismanaged and is in imminent danger of insolvency. In *Gibbs v. Morgan*, 9 Idaho, 100, 52 Pac. 733, under section 4329 of the Revised Statutes, this court held that upon proper application a receiver would to be appointed by a corporation pendente lite. The court said in that case: "As far as possible courts of equity should adapt their practice to the existing conditions of the business world and apply their jurisdiction to the changed conditions and cases arising thereunder, and should not too strictly adhere to forms and rules established under different circumstances and decline to administer justice and enforce rights for which there is no other remedy."

The supreme court of Montana in *State v. Second Judicial District Court*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392, under a statute identical with section 4329, held that the court had jurisdiction to appoint a receiver; and that court, referring to the *French Bank Case*, 53 Cal. 495, says: "In the California case, an important element in the decision as it appears was that the appointment of a receiver acted as a dissolution of the corporation," and says further, "The receiver is not to wind up the corporation under his appointment; he is simply to manage the affairs of the same while charges of the most outrageous frauds of the managers and officers are being investigated in the trial of the action." So in the case at bar the appointment of a receiver does not act as a dissolution of the corporation. The receiver would only manage the affairs of the corporation during the investigation of the charges of conspiracy, incompetency and fraud.

In *Smith on Receiverships*, section 225, it is stated: "Where upon application of a stockholder it is shown that the directors and officers of the corporation are mismanaging its affairs as for their own personal advantage and gain," a receiver will be appointed; and "Where the majority stockholders are clearly violating the chartered rights of the minority, and putting their interests in imminent danger," a receiver ⁴⁷ will be appointed. In section 228 it is said: "Where, however, the conduct of the officers of a corporation is satisfactorily established as fraudulent, it is not only proper, but it is the duty, of the court to wrest from such officers the management of the company and place the company in the charge of a receiver."

In *Gilbert v. Block*, 51 Ill. 513, it is held that if possession of the defendants is obtained by fraud, or that the income is in danger of loss from neglect, waste or misconduct, a receiver will be appointed upon proper application, and in *Re Lewis*, 52 Kan. 660, 35 Pac. 287, that the mismanagement, diverting of funds, applying assets to the benefit of officers, are grounds for a receiver: See *Stevens v. South Ogden Land etc. Co.*, 14 Utah, 232, 47 Pac. 81. In *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, 75 N. W. 46, it was held that a receiver would not be appointed merely because of a difference of opinion between officers or holders of the majority of the stock as to proper policy of managing the corporate affairs, but that one would be appointed when it was shown that the officers and the holders of a majority of the stock are fraudulently managing the corporate business, converting the property to their individual use, and abusing their powers to the injury of the other stockholders. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, was a case something like the one at bar and furnishes an instance of a gross abuse of the trust. It is there held that the law requires of the manager the utmost good faith in the control and management of the corporation as to the minority. The court said: "It is the essence of the trust that it shall be so managed as to produce for each stockholder the best possible returns for his investment. The trustee has so far absorbed all returns." So in the case at bar it is shown that Nieukirk and his favorites have not only absorbed all of the returns, but are about to wreck the company: See *Clark & Marshall on Corporations*, sec. 556.

In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184, the court holds that a receiver may be appointed when ⁴⁸ the affairs of a corporation are being mismanaged and its assets be in danger of being lost to the stockholders. The right of a majority of the board of directors or a majority of the stockholders to loot and mismanage the business of the corporation is not protected by our law simply because it is a corporation. Such rights are no more protected to a corporation than they are to a partner of a copartnership. In this age of trusts and corporations, the managers thereof must be held to as strict an accountability for the fair and honest conduct of the business as a partner conducting the business of a partnership. The allegations of the complaint require the appointment of a receiver, and the judge erred in not appointing one. His action in refusing to appoint a receiver

is reversed and the cause remanded with directions to appoint one. Costs of this appeal are awarded to appellants.

Stockslager, C. J., concurs.

Ailshie, J., expresses no opinion.

WHEN AND AT WHOSE INSTANCE MAY A RECEIVER OF A CORPORATION BE APPOINTED.

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d. Simple Contract Creditors, 206.

I. Scope of Note.

In addition to the grounds upon which a receiver may be appointed over corporate assets, and the persons at whose instance such appointment may be made, this note will discuss the general inherent power of a court of equity to make such an appointment, in the absence of express statutory authority. But the jurisdictional questions which might arise in any particular case, such as those pertaining to notice, process, nonjoinder or misjoinder of parties, situs of the property, etc., are not properly within the scope of this note. Nor is it intended to discuss jurisdiction with reference to any particular class of corporations, but rather the law in regard to the exercise of judicial supervision over the assets of corporate bodies generally. The discretionary powers of the courts in making such appointments are also included and instances given to show the general legal principles by which this discretion is guided.

II. Inherent Jurisdiction of Courts of Equity Over Corporations.

The common law, it has been held, confers no general inherent jurisdiction in courts of equity to appoint receivers of corporations. In most of the states, this jurisdiction has been expressly conferred by statute, but, in the absence of such statute, there are numerous authorities holding that a court of equity, as such, has no jurisdiction to appoint a receiver of a corporation for the purpose of restraining its operations, or winding up its affairs. These authorities reason that the appointment of a receiver of a corporation is tantamount to the dissolution of the corporation, and a sequestration of its property,

and that the forfeiture of a corporate franchise can only be declared in a court of law in a proceeding in the name of the state. Mr. High, in his work on Receivers, section 288, lays down the doctrine: "It is to be observed at the outset, that the general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation, or of winding up its affairs and sequestrating the corporate property and effects, in the absence of express statutory authority, and courts of equity will not ordinarily, by virtue of their general equity jurisdiction, or of their visitatorial powers over corporate bodies, sequester the effects of the corporation, or take the management of its affairs from the hands of its own officers, and intrust it to the control of the receiver of the court upon the application of either creditors or stockholders."

This doctrine is upheld in the following cases: *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Le Societé v. District Court*, 53 Cal. 495; *Have-meyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; *State Ins. & Inv. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 149; *Harrison v. Hebbard*, 101 Cal. 152, 35 Pac. 555; *People's Home Savings Bank v. Superior Court*, 103 Cal. 27, 36 Pac. 1015; *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 561; *Jones v. Bank of Leadville*, 10 Colo. 464, 17 Pac. 272; *Wheeler v. Pullman Iron & S. Co.*, 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; *People v. Weigley*, 155 Ill. 491, 40 N. E. 300; *Coguard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389, 70 N. W. 216, 38 L. R. A. 122; *Mason v. Equitable League*, 77 Md. 483, 39 Am. St. Rep. 433, 27 Atl. 171; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *People v. St. Clair*, 31 Mich. 456; *McCombs v. Merrihew*, 40 Mich. 721; *Tawas and Bay R. R. Co. v. Iosco Cir. Judge*, 44 Mich. 479, 7 N. W. 165; *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 370; *Doyle v. Peerless Petroleum Co.*, 44 Barb. (N. Y.) 239; *Davis v. Flagstaff Mining Co.*, 2 Utah, 74; *Strong v. McCagg*, 55 Wis. 624, 13 N. W. 895; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21.

In *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508, it was said: "It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations, or winding up their affairs," and this doctrine has been since followed in all the California cases cited. In *State Ins. & Inv. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 149, it was held that the court, in the absence of express statutory authority, had no jurisdiction to appoint a receiver of a corporation pendente lite. The case of *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 370, decided nearly one hundred years ago, is of much interest, because it reviews the early conflict of the chancery courts of England in regard to the jurisdiction they should recognize over corporate bodies; for example, it recites that in the case of *Attorney General v. The Foundling Hospital*, 4 Bro. 165, 2

Ves. Jr. 42, the court had no doubt as to its inherent equity jurisdiction over charitable corporations, when the trustees abused their trust. But in *King v. Watson*, 2 Term. Rep. 199, the court of king's bench went farther, and held that the misapplication of moneys by any corporation was an abuse of trust of which a court of chancery could take notice. Jurisdiction, however, was denied in *Attorney General v. Corporation of Carmuthen*, Coop. Eq. Rep. 30, although there had been misapplication of funds. In *Adley v. Whitstable*, 17 Ves. 315, jurisdiction was reluctantly admitted in favor of a member of the corporation who had been excluded from a share in the profits of the company by an illegal law, and there was no mode of ascertaining what was due him, except by an accounting in a court of equity, and jurisdiction was admitted only because of the necessity of the case. But in *Mayor and Commonalty of Colchester v. Lawton*, 1 Ves. & B. 226, equity jurisdiction was denied, though an officer of the corporation had fraudulently executed a mortgage of the corporate property under the corporate seal for other than corporate purposes, the court holding that its jurisdiction was limited only to corporations holding to charitable uses. But though the conflict of authority on this question began at an early day in the English courts, and though, as we have seen, many of the courts of this country have held that a court of equity has no inherent power to appoint a receiver for a corporation in the absence of express statutory authority, a majority of the courts now contend that the temporary control of an insolvent corporation by a receiver does not operate as a dissolution of the corporation, but, that after the debts have been paid, the corporation can resume business under its original charter, and that, pending litigation, or in cases of extreme necessity, the jurisdiction of courts of equity over corporations is an inherent power, and does not depend upon any statute: *Merchants' & Planters' Line v. Wagener*, 71 Ala. 581; *Fort Payne F. Co. v. Fort Payne C. & Iron Co.*, 96 Ala. 472, 38 Am. St. Rep. 109, 11 South. 439; *Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Sheridan Brick Works v. Marvin Trust Co.*, 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666; *French v. Gifford*, 30 Iowa, 148; *Dickerson v. Cass Co. Bank*, 95 Iowa, 392, 64 N. W. 395; *State v. City of New Orleans*, 43 La. Ann. 829, 9 South. 643; *In re Moss Cigar Co.*, 50 La. Ann. 789, 23 South. 544; *Thompson v. Greely*, 107 Mo. 577, 17 S. W. 962; *Ford v. Kansas City & I. Short Line R. Co.*, 52 Mo. App. 439; *State v. Second Judicial Dist.*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392; *United States Trust Co v. New York & R. Co.*, 101 N. Y. 478, 5 N. E. 316; *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; *Porter v. Industrial Information Co.*, 25 N. Y. Supp. 328; *Fidelity Trust & T. Co. v. Schenley etc. Ry. Co.*, 189 Pa. 363, 69 Am. St. Rep. 815, 42 Atl. 140; *Cameron v. Groveland I. Co.*, 20 Wash. 169, 72 Am. St. Rep. 26, 54 Pac. 1128; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Me-*

George v. Big Stone Gap Imp. Co., 57 Fed. 262; Republican Mountain Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; General Electric Co. v. West Ashville Imp. Co., 73 Fed. 386; Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827.

In *Re Moss Cigar Co.*, 50 La. Ann. 789, 23 South. 544, the court announces that, in the absence of statutory authority, a receiver should only be appointed by a court of equity "where the parties litigant agree that it be done, or when it is necessary to the execution of a judgment of the court, or in a case where the property in controversy being under seizure by writ of the court and in custody, it is necessary, as a conservatory process, to care for or administer the same, or where the property of a corporation is abandoned, or there are no persons authorized to take charge of and conduct its affairs, or when done in aid of proceedings pending before the court for the liquidation of the affairs of the corporation"; and practically the same doctrine is announced in the cases cited above of *Thompson v. Greely*, 107 Mo. 577, 17 S. W. 962, and *Ford v. Kansas City & I. Short Line R. Co.*, 52 Mo. App. 439.

In *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776, the court said: "The jurisdiction that a court of equity may lawfully exercise over the affairs of an ordinary business corporation, in the absence of any statute conferring extraordinary powers, is likewise well defined. A court of chancery may, at the instance of a stockholder, and if the company itself refuses to move, lawfully entertain a bill to depose or restrain the officers or directors of a corporation, when it appears that in their capacity as agents or trustees of the stockholders they have committed, or are about to commit, acts that are tantamount to a breach of trust, whether such acts consist of fraudulent dealings with the corporate property or funds, or whether they consist in engaging the corporation in enterprises that are beyond the scope of its chartered powers. In more general phrase, it is sometimes said that a court of chancery may grant equitable relief against a corporation, at the suit of an individual, 'whenever a sufficient case for relief is shown upon ordinary principles of equity jurisprudence'; citing *Morawetz on Corporations*, sec. 1042, and citations; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Zabriski v. Cleveland etc. R. R. Co.*, 23 How. 381, 16 L. ed. 488; *Peabody v. Flint*, 6 Allen, 52; *March v. Eastern R. R. Co.*, 40 N. H. 548, 77 Am. Dec. 732; *Robinson v. Smith*, 3 Paige, 222, 24 Am. Dec. 212. But a court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in a case of a similar controversy arising between the members of an ordinary partnership. Corporations are, in a certain sense, legislative bodies. They have a legislative power, when the directors or shareholders are duly convened, that is fully adequate to settle all questions affecting their

business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief. A stockholder of a corporation cannot successfully invoke the power of a chancery court to control its officers or board of managers, or to divest the corporate property from their charge."

In *Howes v. Oakland*, 104 U. S. 450, 26 L. ed. 827, the doctrine is announced that a court of equity will not interfere with the affairs of a corporation at the suit of a stockholder until "he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes"; and this doctrine is cited and approved in *Dimfel v. Ohio & U. R. Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573, 28 L. ed. 121.

III. Discretion of the Court.

a. **In General.**—Whether or not a receiver should be appointed is always in the sound discretion of the court, but this discretion should be exercised with great caution, and is governed by certain well-defined principles of law: *Crawford v. Ross*, 39 Ga. 44; *Original Vienna Bakery Co. v. Heissler*, 50 Ill. App. 406; *Watkins v. National Bank of Lawrence*, 51 Kan. 254, 32 Pac. 914; *Posner v. Southern Exhaust & Blow Pipe Co.*, 109 La. 658, 33 South. 641; *Davis v. United States Electric Co.*, 77 Md. 35, 25 Atl. 982; *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297; *Myers v. Estell*, 48 Miss. 372; *Thompson v. Greely*, 107 Mo. 577, 17 S. W. 962; *Rawnsley v. Trenton Mut. Life Ins. Co.*, 9 N. J. Eq. 95; *New Foundland Ry. Con. Co. v. Schack*, 40 N. J. Eq. 222, 1 Atl. 23; *Rider v. Bagley*, 84 N. Y. 461; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. 262,

b. **Illustrations.**—"Courts proceed with extreme caution in the appointment of receivers to take the property of a corporation out of the control of its officers, and are much more readily moved to, by proper orders, restrain the doing of improper acts, and compel the recognition of undoubted rights": *Original Vienna Bakery Co. v. Heissler*, 50 Ill. App. 406. "The court should hesitate to take the property and business of a liquidating bank from the control of its directors into its own hands, on the application of a stockholder; it must appear that the danger of loss or injury to the rights of the plaintiff is clearly proved, and the necessity and right of appointment of a receiver free from reasonable doubt": *Watkins v. National Bank*, 51 Kan. 254, 32 Pac. 914.

"Courts are slow to interfere with the domestic affairs of a corporation, and will interfere only in case of downright wrong, injustice and injury in the management of the business": *Posner v. Southern Exhaust & Blow Pipe Co.*, 109 La. 658, 33 South. 641.

"The power is a discretionary one, to be exercised with great circumspection, and only in cases where there is fraud or spoliation, or imminent danger of the loss of property, if the immediate possession should not be taken by the court; and these facts must be clearly

proved. But when these conditions have been fully met, courts do not hesitate to appoint receivers over the property of corporations for the benefit of all concerned during the controversy": *Davis v. United States Electric Co.*, 77 Md. 35, 25 Atl. 982.

"The appointment of a receiver—always in the discretion of the court—will not be made if it is for the best interests of those concerned that the property in controversy should remain in the hands, and under the control of the owners thereof. This discretion of the court should be a reasonable one, governed to a great extent by the facts as they are presented in each particular case, as no rule generally applicable has been or can be established. Nor will this discretion be controlled by the technical legal rights of the parties, but all the equities of the entire case will be considered. The power of appointment is extraordinary in its nature, and far-reaching in its effects, and will be resorted to with the utmost caution, and only under circumstances as demand summary relief": *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. 262.

IV. Grounds for Appointment.

a. In General.—In contemplation of law, all receivers are temporary, and the primary object of their appointment is to secure the property or thing in controversy until it can be distributed by the court among those entitled to it. A receiver's possession, therefore, is not hostile to the rights of either party, as it does not change the title or create any lien, but is for the safety of all concerned. Though the appointment of a receiver is largely in the discretion of the court, there are certain general principles by which the courts are governed in the exercise of their discretion. It may be stated as a general rule that a receiver will never be appointed except to prevent fraud, or when the property itself is in danger of loss or injury: *Crawford v. Ross*, 39 Ga. 44; *Dozier v. Logan*, 101 Ga. 173, 28 S. E. 612; *Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134; *Baker v. Backus' Admr.*, 32 Ill. 79; *Kentucky Racing etc. Assn. v. Galbreath*, 117 Ky. 66, 77 S. W. 371; *Blondheim v. Moore*, 11 Md. 365; *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153, 79 S. W. 175; *State v. Second Judicial Dist.*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392; *Hanna v. Hanna*, 89 N. C. 68; *Ellett v. Newman*, 92 N. C. 519; *Venable v. Smith*, 98 N. C. 523, 4 S. E. 514; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781; *Fernald v. Spokane & B. C. T. & T. Co.*, 31 Wash. 672, 72 Pac. 462; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Worth Mfg. Co. v. Bingham*, 116 Fed. 785, 54 C. C. A. 119.

b. How the General Principle is Applied.—As no unbending rule can be declared which would be applicable to every case where a receiver is sought, the following recent cases will show how the courts have applied the general principle above announced. Thus it is held that where the directors of a corporation in abuse of their

trust paid to themselves unreasonable salaries as officers of the corporation, a receiver may be appointed at the instance of a stockholder in behalf of the corporation: *Donald v. Manufacturers Export Co.*, 142 Ala 578, 38 South. 841. Where the only purpose to be subserved by the appointment of a receiver of a corporation at the suit of stockholders is the bringing of actions in behalf of the corporation, a receivership should be denied: *Hallenborg v. Corbie Grand Copper Co. (Ariz.)*, 74 Pac. 1052. (Mere insolvency alone will not justify the appointment of a receiver: *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191) A receiver should not be appointed at the suit of a simple contract creditor to prevent the corporation from fraudulently disposing of its property, and putting beyond its power the ability to respond to a judgment sought to be obtained on an unsecured note: *International Trust Co. v. United Coal Co.*, 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621.

A receiver will not be appointed because of past acts of the corporation; the situation of the company at the time receivership is asked, and its prospects for the future must be shown to be such as to bring the application within the scope of equitable relief: *Vienna Bakery Co. v. Heissler*, 50 Ill. App. 406; and to the same effect is *Kean v. Call*, 5 N. J. Eq. 365. A receiver may be appointed when the officers and directors are grossly mismanaging the affairs of the corporation: *Davies v. Monroe Waterworks and Light Co.*, 107 La. 145, 31 South. 694; *Posner v. Southern Exhaust and Blow Pipe Co.*, 109 La. 658, 33 South. 641. But it has been held that a receiver would not be appointed at the suit of the holders of only a small portion of the stock on the ground of mismanagement alone, where no fraud was alleged, and the company was solvent: *Callaway v. Powhattan Imp. Co.*, 95 Md. 177, 52 Atl. 916. Where a corporation had not paid a dividend for seven years, because the defendant owned a majority of the stock, and had controlled the corporation in his own interest, this was sufficient ground for the appointment of a receiver: *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150, 53 N. W. 216.

In the absence of statutory or equitable grounds for the appointment of a receiver, none will be appointed merely because the corporation consents thereto: *Vila v. Grand Island E. etc. Co.*, 68 Neb. 222, 110 Am. St. Rep. 400, 94 N. W. 136, 97 N. W. 613. A receiver will not be appointed in a stockholder's suit for mismanagement of corporate affairs, where neither the corporation nor the corporate officers are insolvent, and the corporation is a going concern, properly conducted: *Miller v. Kitchen (Neb.)*, 103 N. W. 297. Where complete redress from the frauds of the directors of a trading company can be obtained within the principles of remedial and preventive equity, a receiver should not be appointed: *Laurel Springs Land Co. v. Fongeray*, 50 N. J. Eq. 756, 26 Atl. 886. A receiver may be appointed at the instance of a director of a corporation when the directors had transferred its entire property and goodwill to a rival corporation, without limitations, for the protection of the stockholders, such action being

ultra vires and constructive fraud on the stockholders: *Jacobus v. Diamond S. W. Mfg. Co.*, 88 N. Y. Supp. 302, 94 App. Div. 366. No receiver can be appointed for a solvent corporation to enable a stockholder who had deposited his stock as collateral for debt to have an accounting of its assets: *Huet v. Piedmont S. L. Co.*, 138 N. C. 443, 50 S. E. 846.

A remote or past danger will not suffice as a ground for the appointment of a receiver, but there must be a well-founded apprehension of immediate danger: *Bookshire v. Farmers' Alliance Exchange*, 73 S. C. 131, 52 S. E. 867. Mere refusal of a corporation to pay its debts, when the total value of its property exceeds its liabilities, is not sufficient ground for the appointment of a receiver: *Brenton & McKay v. Peck* (Tex. Civ. App.), 87 S. W. 898. Cessation of business alone by a corporation does not authorize the appointment of a receiver for its assets: *Clark v. Linseed Oil Co.*, 105 Fed. 787. A receiver for a corporation will not be appointed because the directors thereof exceeded their powers in making a lease of all the corporate property, there being no other violation of duty or mismanagement of the property shown: *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. 776, 58 C. C. A. 576. A receiver will be appointed where a majority of the stockholders are either directly or indirectly violating the chartered rights of the minority by diverting the earnings of the company to themselves: *Columbian Nat. S. D. Co. v. Washed Bar S. D. Co.*, 136 Fed. 710.

V. At Whose Instance Appointed.

a. **In General**—It is a well-established principle that a receiver will only be appointed upon the application of one who has an interest in the property, or has a right to have his claim satisfied out of the property for which the receivership is sought: *Mays v. Rose*, Freem. Ch. (Miss.) 703; *Flagler v. Blunt*, 32 N. J. Eq. 518; *Orphan Asylum v. McCartee*, Hopk. Ch. (N. Y.) 429; *O'Mahoney v. Belmont*, 62 N. Y. 133; *Levenson v. Elson*, 88 N. C. 182; *Rheinstein v. Bixby*, 92 N. C. 307; *Brenton & McKay v. Peck* (Tex. Civ. App.), 87 S. W. 898; and there is no conflict as to this general rule. Those who claim to be included in the general principle stated and usually apply for receiverships of corporate assets are stockholders, judgment creditors, and simple contract creditors. The rights of each of these three classes will be considered.

b. **Stockholders**.—That a receiver may be appointed at the suit of stockholders is very generally upheld: *Continental Nat. B. & L. Assn. v. Miller*, 44 Fla. 757, 33 South. 404; *Wayne P. Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Supreme Sitting of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210; *Elwood v. Greenleaf Nat. Bank*, 41 Kan. 475, 21 Pac. 673; *Posner v. Southern Exhaust & Blow Pipe Co.*, 109 La. 658, 33 South. 641; *Avery v. Bles Mfg. Co.*, 27 N. J. Eq. 412; *Redmond v. Hoge*, 3 Hun, 171; *Woevishoffer v. North*

River C. Co., 99 N. Y. 398, 2 N. E. 47; Mahon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805; Cowan v. Pennsylvania Plate Glass Co., 184 Pa. 1, 38 Atl. 1075; Ogden City v. Bear Lake Waterworks, 16 Utah, 440, 52 Pac. 697, 41 L. R. A. 305; Stevens v. Davison, 18 Gratt. 819, 98 Am. Dec. 692; Earle v. Seattle etc. R. Co., 56 Fed. 909; Towle v. American Bldg. etc. Co., 60 Fed. 131; Aiken v. Colorado River etc. Co., 72 Fed. 591.

1. **Illustrations of the Doctrine.**—The foregoing authorities only establish the general doctrine that the stockholders of corporations are proper parties to apply for receivers, but the following instances will show to what extent their rights in this respect have been regarded by the courts in certain cases. Courts of equity will appoint a receiver of a corporation upon application of minority stockholders when the company is insolvent, and other equities are shown: Continental Nat. B. & L. Assn. v. Miller, 44 Fla. 757, 33 South. 404; and to the same effect is Columbia S. D. Co. v. Washed B. S. D. Co., 136 Fed. 710. A receiver may be appointed at the suit of a majority of the stockholders: Posner v. Southern Exhaust & Blow Pipe Co., 109 La. 658, 33 South. 641. A receiver for an insolvent corporation cannot be appointed upon the ex parte application of the stockholders: Smith v. Ely & Walker Dry Goods Co., 79 Miss. 266, 30 South. 653. A creditor and shareholders of an insolvent corporation may apply for the appointment of a receiver of the corporation to collect unpaid stock subscriptions due from the stockholders, they being also a majority of the officers and refusing to collect: Lamont v. Lamont Crystallized Egg Co. (Mo.), 81 S. W. 1269. A receiver will not be appointed on the ground of fraud at the suit of holders of less than one-fourth of the stock: Stokes v. Knickerbocker Inv. Co., 70 N. J. Eq. 518, 61 Atl. 736. One who owns stock in an insolvent corporation can sue for a receiver, though the stock stood in the name of his broker, who bought it for him: Reinhardt v. Interstate Tel. Co. (N. J. Eq.), 62 Atl. 1097. A receiver for an insolvent, but going, corporation cannot be appointed upon the application of a stockholder owning comparatively small interest in the corporation: Espuella Land & Cattle Co. v. Bindle, 5 Tex. Civ. App. 18, 23 S. W. 819.

c. **Judgment Creditors.**—A receiver of a corporation may be appointed on the application of a judgment creditor: Thompson v. Frist, 15 Md. 24; Falmouth Nat. Bank v. Cape Cod S. C. Co., 166 Mass. 550, 44 N. E. 617; Turnbull v. Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375; Thompson v. Greely, 107 Mo. 577, 17 S. W. 962; Efrd v. Piedmont Land Co., 55 S. C. 78, 32 S. E. 758, 897; Johnston v. Strauss, 26 Fed. 57; Hervey v. Illinois Midland R. Co., 28 Fed. 169; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. Rep. 788 30 L. ed. 864.

d. **Simple Contract Creditors.**—A receiver for an insolvent corporation cannot be appointed at the suit of a simple contract creditor without a lien. This doctrine is based on the elementary principle that a party must exhaust his remedy at law before he can apply for equitable relief, and

is sustained by the authorities generally: *Weiss v. Goetter*, 72 Ala. 259; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 54 Am. St. Rep. 31, 17 South. 525, 28 L. R. A. 707; *Barrett v. Pollak Co.*, 108 Ala. 390, 54 Am. St. Rep. 172, 18 South. 615; *Smith etc. Lumber Co. v. Teague*, 119 Ala. 385, 24 South. 4; *Johnson v. Farnum*, 56 Ga. 144; *Dodge v. Pyrolusite Manganese Co.*, 69 Ga. 665; *Bigelow v. Andress*, 31 Ill. 322; *May v. Greenhill*, 80 Ind. 124; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; *Hubbard v. Hubbard*, 14 Md. 356; *Rich v. Levy*, 16 Md. 74; *Pond v. Framingham etc. R. Co.*, 130 Mass. 194; *Adee v. Bigler*, 81 N. Y. 349; *Lehigh Coal Co. v. Central R. Co.*, 43 Hun, 546; *Virginia P. & P. Co. v. Fisher*, 104 Va. 121, 51 S. E. 198; *Texas Con. Compress etc. Assn. v. Storrow*, 92 Fed. 5, 34 C. C. A. 182; *Jones v. Mutual Fidelity Co.*, 123 Fed. 506.

COLEMAN v. JAGGERS.

[12 Idaho, 125, 85 Pac. 894.]

AN ACTION to Determine Conflicting Claims of Title may be Sustained by a Plaintiff Holding an Equitable Title Only, and against a defendant holding the legal title only, under a statute declaring that an action may be brought by any person against another who claims an estate or interest adverse to him and for the purpose of determining such adverse claim. (p. 211.)

REFORM PROCEDURE—Equitable Title—Abolition of Distinction Between Law and Equity.—The provision of the constitution of Idaho declaring that the distinction between actions at law and suits in equity, and the forms of all such actions and suits are prohibited, and that we have but one form of action for the enforcement or protection of private rights, or the redress of private wrongs, and the statutes enacted thereunder enable any person, whether in or out of possession, and holding the legal or equitable title, to maintain an action against another who claims an estate in real property adverse to him, to have such adverse claim determined and settled. (p. 211.)

REFORM PROCEDURE, Equitable Actions Maintainable Under Whenever There is an Absence of Legal Remedy.—Under the constitution and statutes of Idaho, equitable jurisdiction exists and will be exercised in all cases and under all circumstances where the remedy at law is not adequate, competent and certain, so as to meet all the requirements of justice. That there is a legal remedy is not sufficient unless in all respects as satisfactory as the relief furnished by a court of equity. (p. 212.)

REFORM PROCEDURE—Abolition of Distinction Between Law and Equity, Objects of.—One of the objects of the provision of the constitution of Idaho abolishing all distinctions between actions at law and suits in equity, and giving the district courts jurisdiction both at law and in equity, was to rid our system of the multiplicity of suits and vexatious and cumbersome procedure, and to give litigants full and complete relief in a single action, where, under the old practice, several suits were necessary to accomplish that result. (p. 212.)

H. L. Fisher, for the appellant.

Karl Paine, for the respondents.

128 SULLIVAN, J. This action was brought by the respondents to quiet the title to certain premises situated in Centerville, Boise county. The action was originally brought against Joseph A. Jagers and L. A. Jagers, husband and wife, and H. C. Granger and Belle Granger, husband and wife. It appears from the record that Joseph Jagers and H. C. Granger were engaged in the saloon business in Centerville and became indebted to the respondents; that respondents recovered judgment against them, and the premises in controversy were sold at sheriff's sale and purchased by the respondents; they thereafter procured a sheriff's deed to said premises, and base their claim of ownership on said sheriff's deed. Granger and his wife and Joseph Jagers filed a disclaimer in this suit, and Mrs. Jagers filed her separate answer denying the allegations of the complaint as to the ownership of said premises by the respondents and their right to the possession thereof. She averred that she was the owner and entitled to the possession of the premises, having paid the entire purchase price therefor out of her separate means and property, and that the same was acquired by her as her separate property and estate, and that she had never conveyed the same to anyone. The cause was tried by the court without a jury and judgment entered in favor of the respondents. The first five errors assigned were considered on the argument of this case together. It is contended by counsel for appellant that the undisputed evidence shows that neither the respondents nor the judgment debtors through whom they claim ever had the legal title to the premises in question, and that the legal title now stands in the appellant; that being true, it is contended that an action to quiet title cannot be maintained against the holder of the legal title by the holder of the equitable title. In support of that contention counsel cites the following authorities: **129** Von Drachenfels v. Doolittle, 77 Cal. 295, 9 Pac. 518; Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; Harrigann v. Mowry, 84 Cal. 458, 22 Pac. 658, 24 Pac. 48; Shanahan v. Crampton, 92 Cal. 9, 28 Pac. 50; Chase v. Cameron, 133 Cal. 231, 65 Pac. 460; Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. Rep. 1129, 30 L. ed. 1010; Moores v. Townshend, 102 N. Y. 387, 7 N. E. 401.

The case of *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518, was decided by the supreme court of California in 1888, and it was there held that an action to quiet title cannot be maintained by the owner of an equitable interest as against the holder of the legal title, and cites in support of that proposition only one case—that of *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. Rep. 1129, 30 L. ed. 1010.

The California court seems to have held strictly to the general principles of equity jurisprudence as administered by the chancery courts of England, regardless of the provisions of section 738 of the Code of Civil Procedure of that state. That section is identically the same as section 4538 of the Revised Statutes, and is as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

In *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806, the court apparently took a little broader view of the provisions of that section than it had in some previous cases and said: "But as this court in the past has had occasion to remark, section 738 of the Code of Civil Procedure is broad in its terms; it possesses no limitations or restrictions; and we see no reason why it does not vest in the holder of an equitable title the right to come before the court and have their equities declared superior to any and all opposing equities." The court also said: "There are cases in this state holding that the possessor of an equitable title cannot bring an action to quiet such title against the holder of the legal title," and cites in support of that proposition the authorities above cited. Under the jurisdiction and practice in equity, both in England and in the ¹³⁰ courts of the United States, independent of any statute, a bill to quiet title cannot be maintained without clear proof of both possession and legal title in the complaint; hence one holding the equitable title could not sustain an action against one holding the legal.

In *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. Rep. 1129, 30 L. ed. 1010, which was an appeal from the United States circuit court of the district of Nebraska, the statute of that state authorized an action to quiet title to be brought by any person or persons whether in actual possession or not, and in that case the supreme court of the United States held that the requisite of the plaintiff's possession was dispensed with by statute. That statute, however, did not dispense with the

requisite that the plaintiff must have the legal title, as required by the ancient equity jurisdiction and practice in such cases. That is the only case cited in support of the rule laid down in *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518, which case seems to be the leading case in California, and there the supreme court of the United States recognizes the fact that the general jurisdiction of the courts of equity in regard to such actions has been changed in many of the states by statute. Independent of statute, the equity jurisdiction to quiet title was intended to protect the legal owner of such title from being harassed by suits in regard to the title, and originally such equity jurisdiction could be invoked only by a plaintiff in possession holding the legal title. Such suits have been extended by statute; in many states it is the ordinary mode of trying a disputed title, and suits under such statutes are not now particularly designated as proceedings to quiet title, but are known and designated as proceedings for the determination of adverse claims.

In volume 6, section 735 of Pomeroy's Equity Jurisprudence, third edition, the author there says: "The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right by an action at law. He can immediately, upon knowledge of such claim, require the ¹³¹ nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted."

In section 738 the author says: "As a general rule, the suit may be brought by anyone claiming some right or interest in the land. In most of the states the owner of an equitable interest, as well as the owner of the legal title, may maintain the suit to determine adverse claims." In jurisdictions where courts of equity and courts of law are separate and distinct, and where the equity jurisdiction to quiet title was intended to protect the legal owner of the title from being harassed in regard to such title, the equitable owner could not maintain an action against the one holding the legal title, and in such jurisdiction the one holding the equitable title is required to go into a court of law first to establish his rights, as equity had no jurisdiction of the case, for the reason that the law courts concern the legal title only, and that the

plaintiffs had a plain, adequate and complete remedy at law. But this method of protecting a person's rights was found very cumbersome and vexatious, as in some cases several suits had to be brought before the party could obtain all of his rights. The inability of a court of law to afford adequate relief was the strong argument in favor of extending the jurisdiction of a court of equity in this class of cases. This feature of the matter is commented upon in *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. Rep. 129, 39 L. ed. 167. A statute of the state of Iowa was involved in that case, which statute enlarged the jurisdiction of courts of equity in three particulars at least: 1. It did not require the plaintiff to have been annoyed or threatened by repeated acts of ejectment; 2. It dispensed with the necessity of his title having been previously established in an action at law; 3. The suit might be brought by a party having the equitable title, as well as a party having the legal title. Statutes thus enlarging the jurisdiction of courts of equity have been held to be constitutional: *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. Rep. 129, 39 L. ed. 167.

By the provisions of section 1, article 5 of the constitution of Idaho, the distinction between actions at law and suits in ¹³² equity and the forms of all such actions and suits are prohibited, and we have but one form of action in this state for the enforcement or protection of private rights or the redress of private wrongs, and by the provisions of section 20 of said article, the district court is given original jurisdiction in all cases both at law and in equity, as well as certain appellate jurisdiction, and under the provisions of section 4168 of the Revised Statutes, the complaint in each and every case besides the title of action, etc., is only required to contain a statement of the facts constituting the cause of action in ordinary and concise language and demand for relief. Thus many of the rules of pleading in other jurisdictions in both suits in equity and actions at law have been greatly modified and changed. The provisions of said section 4538 of the Revised Statutes above quoted are very broad, and under them any person, whether in possession or out of the possession, whether holding the legal title or equitable title or what not, may bring his action against another who claims an estate in real property adverse to him, and may in such action have the adverse claim determined and settled.

Under our constitution and statutes equitable jurisdiction exists and will be exercised in all cases and under all circum-

stances where the remedy at law is not adequate, complete and certain, so as to meet all the requirements of justice. That there is a legal remedy is not sufficient. Such remedy, in order to oust or prevent the equitable jurisdiction, must be in all respects as satisfactory as the relief furnished by a court of equity: 1 Pomeroy's Equity Jurisprudence, 3d ed., sec. 297. In the case at bar, if the plaintiffs were required to bring an action at law in ejectment or otherwise, and their right to the possession of the premises in dispute should be adjudged in their favor, then in order to clear their title they would have to bring a suit in equity to annul the legal title held by the appellant. Thus it is shown that an action at law would not be adequate, complete and certain, and meet all the requirements of justice.

One of the objects of our practice act and the provisions of our state constitution in abolishing all distinctions between ¹³³ actions at law and suits in equity, and giving our district courts full and complete jurisdiction both at law and in equity, was to rid our system of a multiplicity of suits and vexatious and cumbersome procedure, and to give litigants full and complete relief in a single action, where under the old practice several suits were necessary to accomplish that result. And in the case at bar there is no good reason why the title may not be fully settled and determined between the parties. The provisions of section 4538 of the Revised Statutes, and the decisions of this court in *Shields v. Johnson*, 10 Idaho, 476, 79 Pac. 391, *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784, *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118, settle this contention, for under them we think every estate or interest known to the law in real property, whether legal or equitable, may be determined in an action of this kind.

The other errors assigned may be considered under the general head of the insufficiency of the evidence to sustain the decision. While the testimony of the appellant shows that she paid for the premises in question with money borrowed by her husband for her, which he repaid to the persons from whom it was borrowed, there is sufficient evidence in the record to throw decided suspicions upon that evidence and its utter inconsistency; instead of taking the deed in her own name, she took the deed from the grantor in the name of herself and a Mrs. Granger, whose husband was the partner of Jagers in the saloon business. Her explanation of that fact is very lame. While Granger himself testified that at the

time of the said purchase Jaggars and himself were running a saloon. They were paying sixteen dollars a month rent, and were not doing a very large business, and Granger proposed to Jaggars that they buy the hotel building in question, and Jaggars replied that he had been thinking about that, and it was there arranged that Jaggars should negotiate for said premises. A few days after that conversation Jaggars informed Granger that he had purchased the premises. Granger asked him if he had money sufficient to pay for it. He replied that he had sufficient; that he had a check for something over seventy dollars, and that he had sufficient. Granger replied that if he hadn't he ¹³⁴ had a little at their home which he would let him have. Jaggars thereupon asked Granger if they had not better have it deeded to their wives, and Granger replied that it did not matter to him. Granger further testified that his understanding was that he owned half of the premises, and that he thereafter sold it to Jaggars after they had dissolved partnership in the saloon business; that in their agreement Jaggars agreed to settle all the bills owing by the partnership and was to take the property and continue the business. This partnership was dissolved a few days after the purchase of the said building, and the partnership was indebted at that time in the sum of about two hundred dollars; that shortly before the trial of this cause, at the request of the appellant's attorney, Granger and his wife conveyed by quitclaim deed whatever title they held in said premises to Mr. Jaggars, and Jaggars thereafter conveyed it to his wife, the appellant.

The trial court, having seen the witnesses on the stand, observed their demeanor and heard them testify, is better qualified to judge of the weight to be given to the testimony of each than this court. That court evidently concluded that said premises were not the separate property of the appellant, and we think that the evidence was sufficient to sustain the judgment. The judgment is therefore affirmed, with costs in favor of respondents.

Stockslager, C. J., concurs.

AILSHIE, J., Concurring. I concur with my associates in the conclusion reached as to the legal propositions involved in this case. As to the sufficiency of the evidence, however, to support the findings and judgment, I have considerable doubt. While there was some evidence supporting the judgment, it was principally hearsay, and incompetent as against Mrs.

Jaggers, the only defendant in this case. The best that can be said for the evidence in the case is that it was desultory and highly circumstantial; rather below the standard of certainty that should be required before taking from a married woman the fruits of her daily labor.

One Having an Equitable Fee may Maintain an Action to set aside a cloud on title: Casstevens v. Casstevens, 227 Ill. 547, post, p. 291. As to whether a person out of possession can maintain a suit to quiet title, see Clay v. Hammond, 199 Ill. 370, 93 Am. St. Rep. 146; Murray v. Quigley, 119 Iowa, 6, 97 Am. St. Rep. 276; Casgrain v. Hammond, 134 Mich. 419, 104 Am. St. Rep. 610; note to Helden v. Helden, 45 Am. St. Rep. 375.

IN RE MOYER.

[12 Idaho, 250, 85 Pac. 190.]

EXTRADITION, Release from Trial Because the Prisoner was not a Fugitive from Justice.—If a prisoner has been brought within the jurisdiction of the demanding state, and is there applying to the court for relief, he cannot raise the question as to whether he was, as a matter of fact, a fugitive from the justice of the state. (p. 217.)

EXTRADITION.—The Question Whether or not a Citizen is a Fugitive from Justice is one that can be available to him only so long as he is beyond the jurisdiction of the state whose laws he is alleged to have transgressed. (p. 218.)

EXTRADITION, Federal Courts, Right of, to Question, When Terminates.—The question whether an alleged fugitive is such in fact ceases to be a federal question as soon as the prisoner invokes its aid within the state from which he is alleged to have fled. (218.)

EXTRADITION, Acts of the Executive, in What Courts not Subject to Inquiry.—The courts of the state demanding a prisoner have no jurisdiction to inquire into the acts of the executive delivering him. (p. 218.)

EXTRADITION, Surrender of Prisoner, Warrant and Acts Accompanying, When Become Functus Officio, and No Longer Subject to Inquiry.—The warrant of the chief executive surrendering a prisoner, whether issued lawfully or unlawfully, has accomplished its purpose, and become functus officio as soon as he has been delivered to the demanding state, and its validity and the legality of its issuance cease to be questions open to the consideration of the courts of the demanding state. (p. 218.)

EXTRADITION.—The Act of a Governor of a State in Issuing His Warrant for the Arrest and Surrender of the Accused to the Agent of Another State is at least quasi judicial, and amounts to a determination that the accused was substantially charged with the commission of a crime and was a fugitive from justice. (pp. 218, 219.)

EXTRADITION.—The Motives Which Prompted the Governor of a State to Issue His Warrant for the arrest of one accused are not proper subjects of judicial inquiry. (219.)

EXTRADITION.—Jurisdiction to Take the Action Complained of is the Test of the Validity of the Governor's Warrant for the

surrender of an alleged fugitive, and the facts are subject to review by the federal courts and the courts of the surrendering state only where they are applied to before the state whose laws it is charged have been violated acquires jurisdiction of the person of the accused. (p. 219.)

EXTRADITION—Return of the Prisoner to the Surrendering State.—There is no process or authority for the return of a prisoner to the state in which he was found and under the warrant of whose governor he was surrendered. (p. 219.)

EXTRADITION—No Vested Right of Asylum.—One who commits a crime against the laws of a state, whether committed by him while in person on its soil or absent in a foreign jurisdiction and acting through some other agency, has no vested right of asylum in a sister state. The fact that a wrong is committed against him in the method pursued in subjecting his person to the jurisdiction of the complaining state, and that such wrong is redressible either in a civil or in a criminal action, constitute no reason why he himself should not answer the charge against him when brought before the proper tribunal. (p. 219.)

EXTRADITION, Gaining Advantage of the Accused, What is not.—The mere apprehension of the accused, though in an unlawful manner, and subjecting him to the jurisdiction of the criminal courts of a state to answer a charge, does not amount to legal advantage any more than if he had voluntarily surrendered himself. The unlawful means employed in making his arrest are not chargeable to the sovereignty, and furnish no reason for discharging him when brought before the court. (p. 222.)

EXTRADITION—Person not Within the Demanding State at the Time of the Commission of the Offense.—Where a person seeks relief by habeas corpus after being surrendered by the governor of another state on the charge of being a fugitive from justice of this state, he cannot obtain his release on the ground that he was without this state at the time of the commission of the alleged offense. (p. 223.)

EXTRADITION—Attack on by Habeas Corpus.—Upon an application in habeas corpus for the release of one who has been surrendered by the governor of another state as a fugitive from justice, if the proceedings are regular on their face and the prisoner is held under process issued by a court of criminal jurisdiction, the writ must be quashed, and this without any inquiry respecting the legality of the proceedings in extradition by which he was brought within the jurisdiction of the courts of this state. (p. 224.)

Fred Miller, John F. Nugent and Edmund F. Richardson, for the petitioner.

J. J. Guheen, attorney general, Owen M. Van Duyn, prosecuting attorney of Canyon county, and J. H. Hawley, W. E. Borah and W. A. Stone, for the state.

²⁵³ AILSHIE, J. The prisoner, Charles H. Moyer, applied to this court, through his counsel, for a writ of habeas corpus, requiring E. L. Whitney, warden of the state penitentiary, to produce the body of the prisoner at a time and place to be designated by the court, and to make true return of the cause

or causes of his detention. A writ was thereupon issued, and the warden, at the time designated, produced the body of the prisoner in court, and made return that he was detaining him under order of the probate judge of Canyon county, and for that purpose as the agent of the sheriff of Canyon county. The return contains a certified copy of the order made by the probate judge, wherein it recites that the Canyon county jail is an unfit place for the detention of the prisoner, and orders and directs that he be temporarily detained in the state penitentiary at Boise City. The return further shows that on the twelfth day of February, 1906, a complaint, duly verified, by Owen M. Van Duyn, prosecuting attorney, in and for Canyon ²⁵⁴ county, was filed with M. I. Church, probate judge of that county, charging the prisoner, Charles H. Moyer, with the crime of murder committed at Caldwell, Canyon county, on the thirtieth day of December, 1905. The return also shows that on the same date a warrant of arrest was duly issued out of the probate court of Canyon county for the apprehension and detention of the accused. The return indorsed on the warrant and made by the sheriff of Canyon county shows that the prisoner was, on the twenty-first day of February, 1906, arrested and taken before the court. It is further shown that at the time of making the return the grand jury of Canyon county was in session, and that the prisoner was held subject to the order of the district court in and for Canyon county, and that he had been from time to time, by order of the court, taken into court to be present at the impaneling of the grand jury. Before the final hearing on the return to this writ, the warden made a supplemental return to the effect that on the seventh day of March, 1906, the grand jury in and for Canyon county found a true bill of indictment against the prisoner, charging him with the commission of the crime of murder, at Caldwell, in Canyon county, on the thirtieth day of December, 1905, and that the indictment was thereupon duly filed in court, and that thereupon a bench warrant issued for the arrest of the accused Charles H. Moyer, and that the same was served, and the prisoner was thereafter, on the ninth day of March, arraigned before the court, and the time for pleading to the indictment was fixed for March 16th; and that the prisoner was thereafter, by the sheriff of Canyon county, returned to the state penitentiary and temporarily placed in charge of the warden thereof for detention, and is now held under such authority. The petitioner answered the

return and supplemental return made by the warden, admitting all the material and essential facts contained in the return; he also pleaded further, separate and independent matter, for the purpose of showing that his imprisonment and detention was illegal and unlawful. While quite voluminous, the substance of this additional and independent matter contained ²⁵⁵ in the answer is, that the petitioner is a citizen of the United States, and of the state of Colorado, residing in the city and county of Denver, and that he has never been within the state of Idaho at any time since the twenty-eighth day of October, 1905, and that he was not in the state of Idaho on the thirtieth day of December, 1905, and was not a fugitive from the justice of the state of Idaho within the meaning of the federal constitution and the act of Congress providing for interstate extradition, and that he was wrongfully and unlawfully removed from the state of Colorado to the state of Idaho in pursuance of an unlawful combination and conspiracy entered into between the governors of the states of Idaho and Colorado, and the prosecuting attorney of Canyon county; that the governor of Colorado wrongfully and unlawfully honored the requisition of the governor of Idaho, and wrongfully issued his warrant and order for the arrest of the prisoner by the authorities of the state of Colorado, and that the prisoner was neither given time nor opportunity to apply to either the state or federal courts for his discharge prior to his delivery to the authorities within the jurisdiction of the state of Idaho. Counsel for the state moved to strike from the answer of the petitioner all matters leading up to and involving the extradition of the petitioner on the ground that the same is sham and irrelevant matter. After hearing exhaustive argument, this motion was sustained, and it was announced from the bench at the time that a written opinion would thereafter be filed setting forth the views of the court on the questions presented.

It is proper to first observe that the extradition proceedings and process by and under which the prisoner was brought into this state appear in all respects regular and in due form.

With the foregoing statement of the case, we will pass at once to a consideration of the questions of law involved.

We are of the opinion that after the prisoner is within the jurisdiction of the demanding state, and is there applying to its courts for relief, he cannot raise the question as to whether or not he has been, as a matter of fact, a fugitive from the

justice of the state within the meaning of the federal constitution, ²⁵⁶ and the act of Congress. A careful and diligent examination of the many authorities touching upon this subject, and the reasons that exist for invoking the aid of the writ in such cases, convince us that the question as to whether or not a citizen is a fugitive from justice is one that can only be available to him so long as he is beyond the jurisdiction of the state against whose laws he is alleged to have transgressed. It is a remedy which does not go to the merits of the case, and does not involve the inquiry as to whether or not he is in fact guilty or innocent of the offense charged. It is a remedy that merely goes to the question of his removal from the jurisdiction in which he is found to the jurisdiction against the laws with which he is charged with offending. If these views be correct, and we believe they are, it follows that so soon as the prisoner is within the jurisdiction of the demanding state, both the reason and object for invoking this principle of law have ceased and can no longer have any application. It has been held that it ceases to be a federal question so soon as the prisoner invokes its aid within the state from which he is alleged to have fled: *In re Cook*, 49 Fed. 833. It must also necessarily follow that the courts of the state demanding the prisoner have no jurisdiction to inquire into the acts of the executive of the state delivering the prisoner. The action and conduct of the chief executive of the state in which the prisoner was found and all of the executive and ministerial officers acting in aid of his warrant is a matter for the consideration of the courts of his state, subject to the reviewing authority of the federal courts in so far as the federal question is involved. The warrant of the chief executive of the state surrendering the prisoner, whether issued lawfully or unlawfully, has accomplished its purpose and becomes *functus officio*, so soon as the prisoner is delivered into the jurisdiction of the demanding state, and its validity and the regularity of its issuance thereupon cease to be questions open to the consideration of the courts of the demanding state.

The prisoner was regularly charged with the commission of a crime in Idaho, and against her laws. The governor of Colorado honored the requisition from the governor of Idaho, and ²⁵⁷ thereupon duly and regularly issued his warrant for the arrest and surrender of the accused to the agent of the state of Idaho. This action of the Colorado governor was at least quasi judicial: *In re Cook*, 49 Fed. 833; it amounts to a determina-

tion that the accused was substantially charged with the commission of a crime and was a fugitive from justice: *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544; *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. Rep. 40, 36 L. ed. 934. The motives which prompted the governor of a state to take such action or make such determination are not proper subjects of judicial inquiry. Such inquiry would be opposed both to the plainest principles of public policy and the freedom of action by the executive within the constitutional authority of that department of government. Jurisdiction to take the action complained of is the test and the jurisdictional facts are subject to review by the federal courts and courts of the surrendering state where they are applied to before the state whose laws it is charged have been violated acquires jurisdiction of the person of the accused. In the latter case the object has been accomplished, and as has been held in several cases, there is no process or authority for returning the prisoner to the state in which he was found: *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204, 32 L. ed. 283; approved in *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. Rep. 40, 36 L. ed. 934; *In re Moore*, 75 Fed. 821.

One who commits a crime against the laws of a state, whether committed by him while in person on its soil or absent in a foreign jurisdiction, and acting through some other agency or medium, has no vested right of asylum in a sister state: *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204, 32 L. ed. 288; *Lascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. Rep. 687, 37 L. ed. 549; *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. Rep. 225, 30 L. ed. 421; *In re Moore*, 75 Fed. 821; and the fact that a wrong is committed against him in the manner or method pursued in subjecting his person to the jurisdiction of the complaining state, and that such wrong is redressible either in the civil or criminal courts, can constitute no legal or just reason why he himself should not answer ²⁵⁸ the charge against him when brought before the proper tribunal. The prisoner does not represent in his person the sovereignty of either the demanding or surrendering state and is in no position to speak for either; on the other hand, if any offense was committed in course of his rendition, it was clearly an offense against the laws of one or both of those states; but neither state is here complaining: *People v. Pratt*, 78 Cal. 345, 20 Pac. 731.

No case has been called to our attention, and, in fact, we have been unable to find any instance where the prisoner has alleged as a ground for his discharge a like state of facts to those set up in the answer in this case, and to which the motion is here directed. We have, however, examined several authorities in which the same course of reasoning adopted by the courts, in holding that the prisoner should not be discharged, is equally and as logically applicable to the facts of this case.

Professor Peabody, sometime lecturer on Criminal Law, before the Harvard Law School, in his text on Interstate Extradition, at page 99, 19 Cyclopaedia, states the general principle touching the rights of prisoners illegally brought into a jurisdiction as follows: "It is not a cause for exemption from prosecution for a crime that the accused was illegally arrested in another state and unlawfully brought within the jurisdiction of the state against which he offended; he is not protected from prosecution even if he is kidnaped in the other state and brought into the state without a semblance of right. It follows, therefore, that he is not wronged by being subjected to its jurisdiction, although the requisition proceedings were not strictly legal. As the state to which a person has been illegally brought may hold him to answer for his offenses against it, it may arrest and surrender him on extradition proceedings to answer for his offenses against another state. The state from which he was wrongfully taken has no redress except to demand the extradition of the abductors that they in turn may be prosecuted by it."

In *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204, 32 L. ed 288, a case in which a controversy arose between the states of West Virginia and Kentucky, over ²⁵⁹ the kidnaping of the prisoner Mahon from the state of West Virginia, Justice Field, after stating the nature of the controversy, said: "The only question, therefore, presented for our determination, is whether a prisoner indicted for a felony in one state, forcibly abducted in another state and brought to the state where he was indicted, by parties acting without warrant or authority of law, is entitled under the constitution or laws of the United States to release from detention under the indictment by reason of such forcible and unlawful abduction." In passing upon the question thus stated, that distinguished jurist said: "As to the removal from the state of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the consti-

tution, which declares that 'a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime,' and the laws passed by Congress to carry the same into effect—it is not perceived how that fact can affect his detention upon a warrant for the commission of a crime within the state to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the matter in which the accused is brought before it. There are many adjudications to this purport cited by counsel on the argument, to some of which we will refer." The opinion closes as follows: "So in this case we will say that, whatever effect may be given by the state court to the illegal mode by which the defendant was brought from another state, no right secured under the constitution or laws of the United States were violated by his arrest in Kentucky and imprisonment there, upon the indictment found against him for murder in that state."

In *Re Cook*, 99 Fed. 833, the United States circuit court had under consideration the validity of an extradition granted by the governor where the party in fact had not been in the demanding state at the time the offense was committed, and the court, speaking of the validity of the executive warrant, said: "His warrant, unassailed by competent authority, is complete ²⁶⁰ justification for the arrest and surrender of the alleged fugitive. When so delivered, by virtue of such warrant, his surrender is lawful, and the demanding state obtains rightful possession of his person, and may lawfully subject him to its criminal process for the offense charged. The executive warrant has then spent its force. It is no longer operative. The alleged offender is no longer subjected to deprivation of liberty by virtue thereof, but is rightfully held under the process of the state. When that has happened, no federal question remains. . . . The fact of flight may be in a sense jurisdictional to removal, as one says a criminal court has jurisdiction only of crime. But such court has jurisdiction to determine whether a certain act charged to have been committed is or is not a crime. Its decision therein, although erroneous, is not void. So here, the jurisdiction to determine the fact of flight is lodged with the executive. He has jurisdiction of the subject matter. His warrant is valid until his determination of the fact of flight is properly reversed. When, there-

fore, such valid warrant has been executed, the surrender thereunder is lawful, and the party lawfully subjected to the state jurisdiction." The later case was appealed to the supreme court, and in *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. Rep. 40, 36 L. ed. 934, the lower court was affirmed, and Justice Brown, who wrote the opinion on appeal, made the following observations: "It is proper to observe in this connection that, assuming the question of flight to be jurisdictional, if that question be raised before the executive or the courts of the surrendering state, it is presented in a very different aspect after the accused has been delivered over to the agent of the demanding state, and has actually entered the territory of that state, and is held under the process of its courts." In *Ex parte Johnson*, 167 U. S. 120, 17 Sup. Ct. Rep. 735, 42 L. ed. 103, the court made the distinction between the service of civil process and that of criminal process, where the party had been wrongfully brought into the jurisdiction, and said: "Indeed, there are many authorities which go to the extent of holding that in criminal cases a forcible abduction is no sufficient reason why the party should not answer when brought within ²⁶¹ the jurisdiction of the court which has the right to try him for such an offense and presents no valid objection to his trial in such court. . . . The law will not permit a person to be kidnaped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest." To the same effect, see *Dow's Case*, 18 Pa. 37; *Ex parte Ker*, 18 Fed. 167; *State v. Smith*, 1 Bail. (S. C.) 283, 19 Am. Dec. 697; 12 Am. & Eng. Ency. of Law, 607; *Eaton v. West Virginia*, 91 Fed. 760, 34 C. C. A. 68; *Kingen v. Kelley*, 3 Wyo. 571, 28 Pac. 36, 15 L. R. A. 177; *Ex parte Barker*, 87 Ala. 4, 13 Am. St. Rep. 17, 6 South. 7; *State v. Ross*, 21 Iowa, 467; *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *Brookin v. State*, 26 Tex. App. 121, 9 S. W. 735; *State v. Glover*, 112 N. C. 896, 17 S. E. 925.

Counsel for petitioner lay much stress on the proposition that neither an individual nor the state can be allowed to gain an advantage by means of an unlawful or wrongful act. That proposition is true, but to gain an advantage means to obtain a superiority of position or opportunity which would not appear to have been done in such a case as this, admitting all the facts charged to be true. Where the state accuses a per-

son of the commission of an offense against its laws, the mere apprehension of the accused, although in an unlawful manner, and subjecting him to the jurisdiction of the courts to answer the charge cannot amount to a legal advantage any more than if the accused had voluntarily surrendered himself to the authorities. The wrongful or unlawful means employed in making an arrest, however criminal they might be, could not be chargeable to the sovereignty, which can commit no crime, but would be the crime of the individual who committed the act and would furnish no reason or justification for discharging the prisoner when brought before the court. If, therefore, a crime should be committed by any person in abducting, apprehending or arresting the accused, such person may be held to answer in the proper jurisdiction for the commission of the ²⁶² offense. But the commission of the latter offense does not expiate the former.

Numerous authorities are cited on behalf of petitioner to the effect that a lawful rendition cannot be had of one who was not in fact within the demanding state when the offense is charged to have been committed. The latest and highest authority that has been brought to our attention on this phase of the case is *Hyatt v New York*, 188 U. S. 691, 33 Sup. Ct. Rep. 456, 47 L. ed. 657, 172 N. Y. 176, 92 Am. St. Rep. 706, 64 N. E. 825, 60 L. R. A. 774. As we have heretofore said, the question as to whether or not the prisoner was in fact a refugee from justice cannot arise at this time in the case at bar. Except for the construction placed on the second clause of section 2 of the fourth article of the constitution of the United States, and section 5278 of the United States Revised Statutes, by the highest court of the land, we should undoubtedly incline to the belief that they were designed and intended to authorize the extradition of any person who has offended against the laws of one state, and is thereafter found in another state. It would seem that by the language: "Who shall flee from justice," is rather meant a flight from a punishment—a penalty or condition which would follow capture and conviction—than a flight from a place or the territorial limits of the outraged commonwealth. The pursuing hand of justice demanding vindication and vengeance is a much stronger inducement to flight than the mere discomforts of place or the horrors or dislike of state lines. While the belief just expressed is the unanimous view of this court as to the real purpose and intent of the extradition clause of the federal

constitution, it amounts to the merest observation in this case and in no respect influences its decision. We are not unmindful of the fact that the almost uniform current of authority, both federal and state, is to the effect that the flight must be from a place, namely, from the territorial limits of the state demanding the prisoner. It is worthy of note, however, that under that line of authority, as was suggested on the argument of this case, an assassin on the Oregon bank of the great waterway that marks our western boundary might, by firing across ²⁶³ the stream, murder numbers of our citizens, and be exempt from extradition, and go free from punishment. In this respect, the views expressed by Mr. Justice Clark in the extraordinary case of *State v. Hall*, 115 N. C. 811, 44 Am. St. Rep. 501, 20 S. E. 729, 28 L. R. A. 289, are worthy of consideration.

Counsel place considerable stress on *In re Robinson*, 29 Neb. 135, 26 Am. St. Rep. 378, 45 N. W. 267, 8 L. R. A. 398, a case where the supreme court of Nebraska ordered a prisoner discharged because he had been forcibly brought into the state without requisition process. That case does not meet the facts of the case at bar; besides, it seems to rest on the rule adopted in civil cases rather than that applied to criminal cases. The statement there made as to the current of authority on the question of interstate extradition leaves it open to the criticism that it is not a sound or carefully considered case. In fact, the weight of authority is entirely the other way, as will be seen from an examination of *Lascelles v. State of Georgia*, 148 U. S. 537, 13 Sup. Ct. Rep. 687, 37 L. ed. 549; *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945. See 11 Rose's Notes on U. S. Rep., p. 239.

The motion having been sustained, the case remains here on the answer of the warden which is admitted to be true. The prisoner has been indicted on the charge of murder; and for the purposes of this case, whether as a principal or accessory, is immaterial under our statute (Rev. Stats., secs. 7679, 7698; *Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39); as is also the question as to whether he was within or without the state at the time of the alleged commission of the offense: Rev. Stats., secs. 6331, 7481. The proceedings appear regular on the face of the returns, and in conformity with the laws of the state, and since the prisoner is being held under process duly and regularly issued by a court of competent criminal jurisdiction, we are commanded by statute to remand him to custody.

The writ is quashed, and the prisoner is remanded to the custody of the officer.

Stockslager, C. J., and Sullivan, J., concur.

Extradition Proceedings are discussed at length in the recent note to *Farrell v. Hawley*, 112 Am. St. Rep. 103, wherein the principal case will be found cited.

EATON v. CITY OF WEISER.

[12 Idaho, 544, 86 Pac. 541.]

NEGLIGENCE, Contributory, in Coming in Contact with an Electric Wire.—The mere fact that a boy, who was injured by coming in contact with an electric wire, must have reached up and struck it with his hand on a dark night is not sufficient to establish his contributory negligence as a matter of law. (p. 227.)

MUNICIPAL CORPORATIONS, Effect of Notice to Officers of. The notice to a municipal corporation of the condition of an electric wire dangerous to life is inferable from notice thereof to its officers. (p. 227.)

MUNICIPAL CORPORATIONS, When Engaged in Private Business so as to be Liable for Negligence of Its Officers.—A city engaged in the enterprise of manufacturing and selling electric light to its inhabitants is not engaged in a public, governmental duty, and is held to the same responsibility for injuries received on account of the negligent conduct of its officers as would a private individual running an opposition plant in the same municipality. (p. 228.)

MUNICIPAL CORPORATION, Duty of in Maintaining Electric Wires.—As an owner and operator of an electric lighting system, it is the duty of a municipality to exercise the diligence and care commensurate with the dangers of the force it is handling, in order to prevent injury to those engaged in their various pursuits and employments. (p. 230.)

MUNICIPAL CORPORATIONS—Negligence in Maintaining a Live Electric Wire.—It is negligence in a municipal corporation maintaining an electric lighting plant and having notice of the condition of a wire to allow a live wire charged with a deadly current to remain suspended over a street and in such a manner that it is likely to come in contact with persons on horseback or in vehicles traveling along a thoroughfare. (p. 231.)

JURY TRIAL—Instructions, When do not Prejudicially Refer to the Facts.—That an instruction in an action for personal injuries was given on the theory that the plaintiff had suffered injury did not prejudice the defendant if there was no dispute on that question. (p. 232.)

Lot L. Feltham, for the appellant.

Rhea & Son, for the respondent.

⁵⁴⁹ AILSHIE, J. The respondent obtained a judgment against the city of Weiser for one thousand and fifty dollars and costs for personal injuries received by him on account of the negligence of the city in maintaining an electric light wire across one of the principal thoroughfares of Weiser. The city owns and is operating an electric light system for the purpose of lighting its streets and selling to the inhabitants of the municipality electric light. It appears that at about noon on the seventh day of March, 1904, a tree was felled by some one across one of the principal streets and struck the electric light wire which was stretched diagonally across the street. After the tree was removed the wire remained sagged about nine feet above the center of the street. It seems that this wire continued sagging until 5 or 6 o'clock that evening, when it was less than eight feet from the ground. One of the employes, who was a lineman and who had charge of the repair wires, was notified about 2 o'clock that afternoon; and later in the afternoon the foreman and general manager and superintendent of the system was also notified of the condition of the wire. Yet nothing appears to have been done toward repairing or raising the wire; and, as evening came on, a current of about two thousand three hundred volts was turned on to the wire. During the evening of that day the travelers along that street, either on horseback or with team, appear to have been obliged to turn to one side or the other in order to avoid striking the wire, and one witness testifies that in passing along about 5:45 in the evening the wire struck him and he received a considerable shock from it. The plaintiff was a schoolboy, some seventeen years old, and at some time during the afternoon noticed that the wire was sagging across the street. That evening between 6 and 7 o'clock he was sent to town on an errand. He went on horseback,
⁵⁵⁰ and it was a dark, rainy night. He says he went down another street and remained down town about three-quarters of an hour and returned on the street over which this wire was stretched. He says: "I started home up Main street, trotting a part of the way. I was in a hurry to get out of the rain and I was coming back to Mrs. Daly's entertainment at the opera-house. I had to take the horse back and I had to dress up. There were lights as I went home, one by the opera-house; there was one at the Monroe creek bridge, one at Mr. Hass' house and one at the Baptist Church, and there was one just below Mr. Sater's on Tenth street,

about a block below Mr. Sater's. I did not notice any other lights in the streets at all. Something happened there by Mr. Sater's place. The last thing I remember was seeing Mr. Clayburgh sitting in his store talking to someone, and then I saw a flash, and that was the last I remember. The next I remember is the next morning some of the folks came in there and I woke up and asked them what was the matter with my hand. I do not remember of there being any obstruction in the street that night at all. I knew the wire was there but I didn't know it was down." No one saw the occurrence, but it is in evidence that the boy was badly injured from an electric shock, and it is also equally certain that he received it from this wire. The city contends, however, that he was guilty of such contributory negligence as to prevent a recovery, and predicates that contention principally upon the fact that the wire came in contact with his hand only. It is argued that if he had not been reaching for the wire that it would have necessarily struck his head or body, and that the very fact that it first came in contact with his hand is an evidence that he had extended his hand in the direction of the wire. We don't think this circumstance is sufficient to establish such contributory negligence as to prevent a recovery. There might be a great many explanations made as to why his hand was extended and struck the wire first; indeed, the wire might, as a matter of fact, have struck the body first, but not in such a way as to complete the electric circuit, and the plaintiff would have immediately attempted ⁵⁵¹ to remove it with his hand. Such action would have been almost involuntary. On the other hand, he might have seen the wire an instant before coming in contact with it and have thrown up his hand to ward it off. In our view of the facts of this case, however, it is unnecessary to speculate as to how this occurred.

The first contention made by appellant is that the city is not liable for personal injuries to individuals occasioned through the negligence of officers of the corporation to properly perform their duties. We had occasion to give this contention very careful consideration in the case of *Carson v. City of Genesee*, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862. In that case we held that: "Cities and villages incorporated under the general laws of Idaho, which grant to such municipal corporations exclusive control over their streets, avenues, lanes and alleys are liable in damages for a negligent

discharge of the duty of keeping such streets and alleys in a reasonably safe condition for use by travelers in the usual modes." We are satisfied with the doctrine announced in that case, and do not think it necessary to again go into a consideration of the reasons for such a rule. It has been followed by this court in *Moreton v. Village of St. Anthony*, 9 Idaho, 532, 75 Pac. 262; *Village of Sand Point v. Doyle*, 11 Idaho, 642, 83 Pac. 598, 4 L. R. A., N. S., 810. In the case of *Moreton v. St. Anthony*, 9 Idaho, 532, 75 Pac. 262, we did say however "that a municipality is not guilty of negligence for every act or omission which would constitute negligence on the part of an individual. Much discretion is vested in such bodies." In the present case it is quite clearly established that the city did have ample and abundant notice of the condition of this wire. Notice to the employés of the city who had charge and control of its electric light system, and whose duty it was to keep it in order and to repair wires and the like, was notice to the city. A municipality can only act through officers and agents, and notice to an officer, agent or employé concerning the condition or status of a particular and specific business for and about which he is engaged is notice to the municipality itself. Aside, ⁵⁵² however, from the duty which municipalities owe to the public to keep their streets and thoroughfares in a reasonably safe condition for use by travelers in the usual modes, there is another and even stronger reason why the city should be held liable in this case. The city was engaged in a private enterprise, namely, that of manufacturing and selling electric light to its inhabitants. Such an engagement or enterprise is not one of the public governmental duties of municipalities. Municipal ownership in the usual and common acceptation of that term must of necessity carry with it the same duty, responsibility and liabilities that are imposed upon and attach to private owners of similar enterprises. If the city owns and operates an electric light system and sells light to its inhabitants, there is no reason why it should not be held to the same responsibility for injuries received on account of its negligent conduct of the business as would a private individual be who might be running an opposition plant in the same municipality and selling light to the citizen thereof. There is abundant authority to be found in the books in support of this position. As early as 1858, the supreme court of Pennsylvania in *Western Savings Fund Soc. v. City of Philadelphia*, 31 Pa.

175, 72 Am. Dec. 730, said: "The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the ⁵⁵³ grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred."

Mr. Dillon, in volume 2 of his work on Municipal Corporations, at section 954, says: "A municipal corporation owning waterworks or gasworks which supply private consumers on the payment of tolls is liable for the negligence of its agents and servants the same as like private proprietors would be." And again, at section 985 of the same work, in speaking of the liability of a municipality "as a property owner," says: "Upon similar grounds, municipal corporations are liable for the improper management and use of their property, to the same extent and in the same manner as private corporations and natural persons."

In volume 1 of Shearman and Redfield on Negligence, section 286, the authors say: "In its proprietary or private character a municipal corporation may engage in enterprises for its own immediate profit or advantage as a corporation, although inuring ultimately, of course, to the benefit of the public. Of this character are waterworks, to supply water to consumers; or gasworks, to supply gas, on payment of rates or tolls, and other similar enterprises. In respect of its liability for negligence in the construction and maintenance of such works, the corporation is on the same footing with

private proprietors, and is liable for the negligence of its agents in the management of its business.”

In *Aschoff v. City of Evansville*, 34 Ind. App. 25, 72 N. E. 279, the Indiana appellate court entered into a somewhat extended discussion as to the distinction between those acts of municipal corporations that fall within and are necessarily performed under authority of the sovereign, governmental or public power and duty devolving upon such corporations, and those acts and undertakings in which they engage in their private and business capacity. After pointing out many distinctions, ⁵⁵⁴ the court arrives at the following conclusions: “Where the water system is conducted by the municipality in part for profit, even if principally for public purposes, the municipality is liable for damages caused by its negligent management: *Chicago v. Selz etc. Co.*, 104 Ill. App. 376. And where it supplies water to its citizens, and charges therefor, it acts in its private capacity, although such waterworks system is also used for the extinguishment of fires. So acting, ‘it stands on the same footing as would any individual or body of persons upon whom a like special franchise had been conferred.’ ”

One of the most carefully considered and tersely stated cases we have examined on this subject is that of *Esberg Cigar Co. v. City of Portland*, 34 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 961, 43 L. R. A. 435. After reviewing a number of authorities, the court said “In accordance with this distinction it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gasworks in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual.” To the same effect as the foregoing authorities, see 2 Beach on Public Corporations, sec. 1140; Cooley’s Constitutional Limitations, p. 249; 20 Am. & Eng. Ency. of Law, 2d ed., 1205; *Dunston v. City of New York*, 91 App. Div. 355, 86 N. Y. Supp. 562.

The city was using this wire across one of its public thoroughfares for the purpose of carrying and distributing a most powerful and dangerous force, and one but poorly understood by the masses. Aside from its duty to maintain its streets in a reasonably safe condition, it was under a much

greater duty, as the owner and operator of a lighting system, to exercise diligence and care commensurate with the dangers of the force it was handling in order to avoid and prevent injury to those rightfully engaged in their various pursuits and employments: *Perham v. Portland General Elec. Co.*, 555 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 24, 40 L. R. A. 799; *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596; *Denver Con. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Cook v. Wilmington City Elec. Co.*, 9 Houst. (Del.) 306, 32 Atl. 643; *Macon v. Paducah St. R. Co.* 110 Ky. 680, 62 S. W. 496; *Economy Light & P. Co. v. Stephen*, 187 Ill. 137, 58 N. E. 359; 15 Cyc. 471; *City of Denver v. Sherrett*, 88 Fed. 226, 31 C. C. A. 499; *Joyce on Electric Law*, secs. 450, 451; *Croswell on Electricity*, sec. 234.

The plaintiff was a mere boy, attending the public schools, and it would not be presumed that he was very familiar with electricity; and, in fact, it is not shown that he had any particular knowledge of its dangers more than would be possessed by any other boy of that age. He was traveling along the public highway where he had a right to be. He was not a servant or employé of the defendant, and was chargeable with no duty to it other than that arising from his citizenship in the municipality. That he was seriously and permanently injured is undoubted. Having notice, as the city had in this case, it was negligence to allow a live wire charged with a deadly current to remain suspended over a street in such manner that it was likely to come in contact with persons on horseback or in vehicles traveling along that thoroughfare. The evidence abundantly supports the verdict and judgment.

We have examined the rulings complained of in the admission and rejection of evidence, and we do not think any error was committed in the rulings of the court in those respects.

The appellant complains of the action of the court in giving a number of instructions. Appellant urges that the instructions were in many instances conflicting and confusing, and that in one instance they invaded the province of the jury as to matters of fact, and that the instruction on contributory negligence is erroneous and prejudicial to the appellant. It is unnecessary to repeat these instructions at length here or to deal with the objections made in detail. Our examination of them has failed to disclose any material inconsistency or any invasion of the province of the jury. The court does

⁵⁵⁶ not appear to have expressed any opinion upon the facts. It is true that the instructions are given on the theory that the plaintiff had suffered an injury, and our examination of the record discloses to us that there was no dispute but that the plaintiff had received a serious injury; the only dispute on that point was as to the extent and gravity of the injuries received. This matter was properly submitted to the jury, and was evidently considered by them in fixing the amount of damages. Upon the objection that the court incorrectly stated the law of contributory negligence, we are satisfied no error was committed against the city. The instruction, if it varies at all from the true rule, is more favorable to the city than it was entitled to have given, and it has no cause for complaint against the instruction as it was given. A detailed consideration and discussion of the numerous rulings of the court and instructions given to which the appellant has taken exceptions would be of no particular value or importance here, and we therefore refrain from any further consideration of them in this opinion.

We find no error in the record that would justify the reversal of the judgment. The judgment is affirmed, with costs in favor of the respondent.

Stockslager, C. J., and Sullivan, J., concur.

Electric Companies are Held to the Highest Degree of Care practicable to avoid injury to persons who may, accidentally or otherwise, come in contact with their wires: *Wilbert v. Sheboygan Light etc. Co.*, 129 Wis. 1, 116 Am. St. Rep. 931; *Guinn v. Delaware etc. Tel. Co.*, 72 N. J. L. 276, 111 Am. St. Rep. 668, and cases cited in the cross-reference note thereto. As to the application of this rule to municipal corporations which attempt to operate electric plants, see *Tisher v. New Bern*, 140 N. C. 506, 111 Am. St. Rep. 857; note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 535.

POTLATCH LUMBER COMPANY v. PETERSON.

[12 Idaho, 769, 88 Pac. 426.]

EMINENT DOMAIN—Complaint, When Shows Necessity for Taking Land for a Reservoir for Accumulating Water to Float and Store Logs.—A complaint alleging that a river is narrow, not of uniform size during all seasons of the year, dependent on rain and snow, does not during certain portions of the year carry sufficient water to float logs except by the use of artificial means; that it is necessary to store water by the use of dams and other means; that such dams must be built at points rendered favorable to topography; that the dam was constructed for the purpose of storing waters and furnishing a storage basin for logs and improving the floating capacity and navigability of the river, is sufficient to show that the land sought to be taken will be used for the purpose of storing and floating logs on the river and improving its navigability, and sustains the exercise of the power of eminent domain. (pp. 239, 240.)

EMINENT DOMAIN, Right of Extends to Streams Whether Navigable or not.—The right of eminent domain to be used to improve streams includes both the navigable and the unnavigable. (p. 240.)

WATERS, STREAMS, Navigability of cannot be Determined by the Legislature.—The declaration of a state legislature cannot impress upon a stream the character of navigability for logs, when the stream does not in fact carry water sufficient to float a single log. (p. 240.)

EMINENT DOMAIN, Nature and Extent of the Power of.—The power of eminent domain is an incident of sovereignty inherent in the federal government and in the several states. (p. 241.)

EMINENT DOMAIN, Constitutional Grant of Right to Exercise the Power of.—The provision in regard to eminent domain and the taking of property for public use in the constitution of Idaho emanates directly from the people instead of the legislature, and is therefore legal and valid. (p. 241.)

EMINENT DOMAIN—Public Use.—The Use of Lands for Storage Basins and the Improvement of the Floatability of Streams of Water, whether navigable or not, is a public use under a constitution declaring that the use of lands to a complete development of the material resources of the state is a public use. (p. 243.)

EMINENT DOMAIN—Public Use, What is—Flexibility of the Term.—The term "public use" is flexible, and necessarily has been of constant growth as new public uses have developed. What is a public use will depend somewhat upon the nature and wants of the community for the time being. (p. 244.)

Wm. M. Morgan, for the appellants.

John P. Gray and G. G. Pickett, for the respondent.

774 SULLIVAN, J. This action was commenced for the purpose of condemning twelve and sixty hundredths acres of land belonging to the appellants for use as a storage reservoir for logs, and which is overflowed by reason of the construction

of a dam tending to improve the navigability of the Palouse river. The complaint alleges with particularity the necessity for the appropriation and the facts upon which ⁷⁷⁵ respondent bases its right to condemn. The Palouse river is a small stream having its source in the state of Idaho, and flows westward into the state of Washington. At certain seasons of the year, its banks are full of water, and it becomes in its natural state a floatable stream for logs. Except during the freshets it is a small stream incapable of serving as a highway for logs, except by the use of splash dams and other artificial means. Along its headwaters are forests of pine and other timber, a large number of acres of which belong to respondent. The stream affords the only means of transporting the timber from the forests to the market. The respondent owns three mills upon said stream and employs a large number of men in connection therewith, which mills depend on their supply of sawlogs from such forests, and depend wholly upon said stream for floating said timber down to the mills. At the town of Potlatch, Idaho, respondent has constructed a large sawmill located a short distance down the stream from the land sought to be condemned, and has built a dam near said mill on said stream for the purpose of improving the navigation of said stream for logs and affording a storage reservoir for holding the logs for said mill.

The complaint alleges specifically the facts found by the court which are hereafter set forth. The appellants demurred to the complaint on the ground that it did not state a cause of action and relied upon two propositions of law in support of said demurrer: 1. That the taking of said land was not for a public use; and 2. That the statutes of Idaho were not sufficiently broad to cover such use. The demurrer was overruled by the court and appellants refused to further plead, and stood on their demurrer. Evidence in support of the allegations of the complaint was introduced, and the court made its findings of fact and conclusions of law and entered a decree in favor of the respondent. The court decreed that the defendants were entitled to receive from the plaintiffs five hundred dollars as full compensation for the damages suffered by them for the taking of said land for said purposes. The facts found by the court necessary to the understanding of this case are as follows:

⁷⁷⁶ After finding that the plaintiff was a corporation duly organized, etc., and that the defendants were husband and

wife and in possession of the land sought to be condemned, it found that a large area of land, aggregating hundreds of square miles in the northern portion of Latah county, Idaho, is heavily timbered with a growth of pine and other merchantable and valuable timber; that said territory is drained by the Palouse river and its tributaries and that said lands are adjacent to and lie along the Palouse river and its tributaries; that for many years the said timber area laid undeveloped; that no general business was carried on and no towns or settlements were located in said region; that said county derived practically no taxes from any property situate in said section; that the title to said land was very largely in the government of the United States; that during the past four or five years the plaintiff corporation has become the owner of large tracts of said timber land, and has invested and expended large sums of money in purchasing said timber and timber lands, and is commencing operations to develop the same; that it is the owner of three sawmills on said river, and that the mill at Potlatch in said county was in the course of construction, and employs, and will continue to employ, a large number of men; that said river is a stream used for floating and rafting purposes, and the driving of logs and timber products; that it is capable of serving an important public use and utility, and has been declared to be a navigable stream by the legislature of Idaho; that it is navigable for logs only; that it is not navigable for boats of any character or description; that it rises in the state of Idaho and flows for a long distance through the territory described, which is heavily timbered with valuable merchantable timber, and flows into the state of Washington; that said sawmills of plaintiff are situated in what is known as the great Palouse farming country; that there is no merchantable saw timber throughout that farming country, and the forests along said river are the natural supply point from which the said farming country secures its timber and timber products, and the said sawmills⁷⁷⁷ are furnishing and supplying a large part of the demand for lumber throughout said country, both to citizens of the state of Idaho, and the state of Washington; that the only means of transportation of said timber from the forests to the mills at the present time is the said river; that said river is not a wide river; and is not of uniform size during all the seasons, but is subject to the rise and fall dependent on the rain or snow, and, during portions of the year, there is not

sufficient water to float the logs in said stream except by the use of artificial means, it being necessary to store the water by the use of dams and splash or flood the logs down, by opening the dams; that it is impossible for plaintiff to transport during the high stages of water sufficient logs to run its mills during the entire year, although it does take down at such times as many of said logs as is practicable under the circumstances; that during the periods of high water the convenient, economical and practical method of transporting the logs from the forests to the mills is by the use of said splash dams; that said dams cannot be constructed at any place, but necessarily must be built, constructed and maintained at points rendered favorable by the topography of the land on the sides of the river, which affords storage basins for logs, which are very few; that said timber lands owned by the plaintiff are located in that part of the state of Idaho where the working and developing of the timber industry constitutes the principal and main business and occupation of its inhabitants, and that plaintiff in cutting, removing and manufacturing the said timber owned by it, and in the construction of its mill at Potlatch, will employ in said state a large number of men, aggregating many hundreds; that along and adjacent to said river are few farms, and, excepting the lumber industry, the said farming industry constitutes the only industry in which men are engaged in that section of the country; that said farms are situated far from the open market, but the development of the lumber district has and will afford a market at home for the products of the said farms, and the development of the lumber industry is of great importance ⁷⁷⁸ and benefit to the said farmers residing in that section of the county; that the land upon which said timber now stands is covered with a fertile and productive soil, and upon the removal of the timber will become valuable agricultural land affording homes for thousands of people, and the removal of the timber will result in the development and building up of that section of the farming country described; that the plaintiff has constructed a dam for the purpose of storing the waters of the Palouse river and furnishing a storage basin for logs for the purpose of improving the floating capacity and navigability of said river; that said dam extends across said river; that by reason of the construction of said dam a portion of the land situate in the northeast quarter of the northwest quarter of section 7, township 41 north of

range 4 west, Boise meridian, is overflowed by water being backed up by the said dam (then follows a complete description by metes and bounds of said land, containing a total area of twelve and sixty hundredths acres); that seven and seventy hundredths acres thereof is meadow land and four and ninety hundredths acres is brush land; that where said dam is constructed is one of the few places upon said river naturally fitted for the construction and maintenance of the same; that the use of said river by said dam and storage reservoir is the necessary means to a complete development of the material resources of this state, and the use of the said dam and storage reservoir will become and constitutes a public use within the provisions of section 14, article 1, of the constitution of Idaho, and the acts of the legislature of the state of Idaho; that the timber of plaintiff cannot be successfully removed and manufactured by any other means than the use of said river except at an enormous, unreasonable and unprofitable expense; that in the manufacture of said timber into lumber at that place it is absolutely necessary that dams for improving the navigation of said stream and storage reservoirs for storing and holding said logs be used, and the necessary use is so great that the timber upon the said areas of land cannot be profitably worked without ⁷⁷⁹ the use thereof; that to construct said dam at the point where it is absolutely necessary in the profitable and reasonable use of the stream for the purposes of plaintiff, as aforesaid, it is necessary to overflow the said twelve and sixty hundredths acres of land; that said land is only a portion of a forty acre tract which defendants are in possession of at that point; that there exists a necessity for the appropriation by the said plaintiff of that part of the lands in the possession of defendants to enable the plaintiff to carry on and conduct its business of lumbering and in developing the material resources of said county; that without such appropriation plaintiff cannot profitably, successfully and completely develop its said timber lands, whereas the use of the said lands will enable the plaintiff to profitably and reasonably develop its properties, and thereby develop the material resources of the state; that the denial of the right to use said lands would be disastrous upon the growth and prosperity of the state, and would tend to hinder and retard the development of the material resources of the state; that the plaintiff has been unable to secure the use of said land by agreement or other-

wise with the said defendants, though plaintiff did heretofore and before the commencement of this action request and seek to procure from the said defendants said lands for the said storage basin for logs, which request was refused by the defendants and each of them; that plaintiff, when it made such request of the said defendants, offered them a reasonable compensation for the said land for any damages resulting from the grant of said land, and defendants refused to accept said offer for compensation; that the defendants purchased said land with the full knowledge that the plaintiff had already constructed a dam and overflowed said land, and that the plaintiff would need the same in the necessary use of the said river for the purpose of logging, and would need the same for the storage of logs; that said land is not more valuable than thousands of acres of other land situated near and adjoining the same and in the vicinity thereof, and the court finds that the award made by the commissioners of five hundred dollars is ⁷⁸⁰ a just and fair award of all the damages suffered by defendants by reason of the taking of said land for the purposes mentioned; and as conclusions of law from the foregoing facts the court found that the plaintiff was entitled to a decree adjudging and awarding to him the use and easement of said twelve and sixty hundredths acres of land for the purpose of storing logs, floating logs and improving the navigation of said stream, and the right and privilege of overflowing said land. The proper decree was entered in accordance therewith. This appeal is from the judgment, and the only error assigned is the action of the court in overruling the demurrer to the complaint and entering judgment for plaintiff.

It is contended by appellant that the provisions of section 14, article 1 of the state constitution, and the statutes of the state in force in regard to the powers of eminent domain, are not sufficiently broad and comprehensive to authorize or permit the respondent, who is plaintiff here, to have condemned the lands in question for the uses and purposes stated in the complaint. Section 14, article 1 of the Idaho constitution is as follows:

“Section 14. The necessary use of lands for the construction of reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial, or necessary purpose, or for drain-

age; or for the drainage of mines, or the working thereof by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

“Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.”

⁷⁸¹ Subdivision 3 of section 5210, Revised Statutes, as amended by the laws of 1903, page 204, is as follows:

“Section 5210. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:... . . . Subd. 3. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, steam, electric and horse railroads, reservoirs, canals, ditches, flumes, aqueducts and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for storing and floating logs and lumber on streams not navigable.”

It is first contended that the complaint does not state a cause of action under said provisions of the constitution and the statute, in that it nowhere alleges that it is proposed to use the land sought to be taken for a reservoir with a view to public transportation. The allegation on that point is to the effect that said river is narrow and not of uniform size during all seasons of the year; is dependent on rain and snow and during portions of the year it does not carry sufficient water to float logs except by the use of artificial means; that it is necessary to store the water by the use of dams and splash or flood the logs down by opening the dams; that during the period of high water, the convenient, economical and practical method of transporting said logs from the forest to the mills is by the use of such dams; that such dams cannot be constructed at all places, and must be built at points rendered favorable by the topography of the land on the sides of the river which affords storage basins for logs; that said dam was constructed for the purpose of storing the waters of said river and furnishing a storage basin for logs for the purposes alleged, and for the purposes of improving the floating capacity and navigability of said river, particularly at the sea-

son of the year when said river was at the lowest stage. I think the allegations of the complaint are sufficient to show that the land sought to be taken will be used for the purpose of storing and floating logs and timber on said river and improving ⁷⁸² its navigability, and under said provisions of the constitution and of subdivision 3, section 5210, Revised Statutes, the right of eminent domain has been extended to land for storing as well as floating logs and timber, and is declared to be a public use.

It is contended that the right of eminent domain under the provisions of said section 5210 can only be exercised in the improvement of streams not navigable, and that as the territorial legislature had declared, by act approved February 14, 1879, that the Palouse river was a navigable stream, the right of eminent domain could not be exercised to improve the navigability of said stream. I cannot concur in that contention, as it is clear the provisions of said section 5210 are applicable to all streams not navigable in fact. It is alleged in the complaint and found as a fact by the court that the said stream is not even navigable for logs a part of the season, and I have no doubt that said section applies and was intended to apply to all such streams. Judge Hanford, in the United States circuit court for the state of Washington, in *Voltz & Metcalf v. Potlatch Lumber Co.*, held that said stream was not a navigable stream except during portions of the year, and that the evidence in that case clearly showed that during a portion of the year logs could be floated upon it; that the period during which they could be floated without the aid of artificial means was comparatively short, constituting only a month or two of the entire year; that during the remainder of the year said stream was not navigable. The decision in that case has not been published in the reports. The court holds that said stream is not navigable in fact, upon the evidence produced on the trial. It is clear to this court that the declaration of a state legislature cannot impress upon a stream a character of navigability for logs when the stream does not carry water sufficient to float a log. If a stream is not navigable in fact, the mere legislative declaration that it is navigable in fact cannot make it so: *Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 232, 50 S. W. 1095; *Duluth Lumber Co. v. St. Louis Boom Co.*, 17 Fed. 419, 5 McCrary, 382.

⁷⁸³ It is alleged in the complaint, and the court found in the case at bar, that said river was not navigable for commer-

cial purposes in its natural state, and it is clear from the allegations of the complaint and findings of the court that it is not navigable for logs or timber products during a great portion of the year unless aided by artificial means and devices. The language used in paragraph 3 of said section 5210, as amended, refers not to streams capable of floating logs, but to streams which are navigable in fact; for it was certainly understood by the legislature that many of the streams of this state which would float logs during flood time did not carry sufficient water to float logs during the remainder of the season, and in order to make them so, the right of eminent domain would need to be exercised for the purpose of procuring land in order to improve the same for storing and floating logs and lumber.

Then the question is fairly presented: Does the use of said dam and storage basin of twelve and sixty hundredths acres under the aforesaid facts constitute a public use within the provisions of said sections of our constitution and statutes? The conclusion by this court upon that question is of very great and lasting importance to the complete development of the material resources of our state.

In limine, we shall make a few observations upon the power of eminent domain. That power is an incident of sovereignty inherent in the federal government and the several states by virtue of their sovereignty. This power with all its incidents is vested in the legislatures of the several states: 1 Lewis on Eminent Domain, sec. 237; Cooley's Constitutional Limitations, 7th ed., 755; Hollister v. State, 9 Idaho, 8, 71 Pac. 541.

The provisions in regard to the power of eminent domain and the taking of private property for a public use contained in said section 14, article 1, of our constitution, emanate directly from the people instead of from the legislature, and are, therefore, legal and valid, emanating from the highest power. In meeting the marvelous industrial development of many of the United States in the last one hundred years, it ⁷⁸⁴ has been found impossible in many instances to follow or apply the letter of the common law in regard to the power of eminent domain. To follow it in the application of that power in many instances would greatly hamper, retard, and in many instances defeat, the development of the great natural advantages, resources and industrial opportunities of many of the states of the Union. And the framers of our constitution thoroughly understood those facts, and understood that

a complete development of the material resources of our young state could not be made unless the power of eminent domain was made broader than it was in many of the constitutions of the several states of the Union. In Idaho, owing to the contour of the country, its mountain fastnesses and the great difficulty of preparing and constructing means and modes of communication and transportation, and also owing to the arid condition of the state, the necessity for irrigation in the development of the state's agricultural resources and in the development of its boundless mineral wealth, it was considered a necessity to the complete development of the material resources of the state to enlarge and broaden the power of eminent domain in the state; hence the adoption of said section 14, article 1 of our constitution. In many of the state constitutions the right to exercise the power of eminent domain is made to depend upon the question whether the use contemplated is or is not a public use in the most narrow and restricted meaning of the phrase "public use." The decisions under many state constitutions, therefore, are of little value as precedents for cases arising under constitutions like that of Idaho, Colorado, and other western states, which make the character of the use, whether strictly public or otherwise, the criterion of the right to exercise the power. There are two well-marked and conflicting lines of decisions by the courts in dealing with the constitutional rights to exercise the power of eminent domain. One class of those decisions is represented by *Brown v. Gerald*, 100 Me. 351, 109 Am. St. Rep. 526, 61 Atl. 785, 70 L. R. A. 472, which draws a sharp distinction between "public use" and "public benefit," and ⁷⁸⁵ guards the private rights of property against the assertion of the power of eminent domain for public benefits as distinguished from public use. The other line of decisions is represented in *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371, 1 L. R. A., N. S. 208, which case was taken by error to the supreme court of the United States, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085. That was an action to condemn land for the enlargement of a private ditch, and the supreme court of the United States there held that the peculiar local conditions in the state of Utah justify the enactment of a statute under and by which an individual land owner may condemn as for a public use a right of way across a neighbor's land for the enlargement of a private irrigating ditch in order to obtain water to irrigate his land,

which would otherwise remain valueless. The latter class of cases takes the view that the general welfare and benefit of the public should prevail over private property rights, even though the use for which the power of eminent domain is asserted is not in a strict sense a public use, and, as stated in the note to *State v. White River P. Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A., N. S., 842: "The influence of peculiar local conditions and necessities in determining the choice between these two tendencies is plainly discernible." The case of *Talbot v. Hudson*, 16 Gray (82 Mass.), 417, belongs to the latter class, and it was held in substance that in determining whether the use is public, it has never been held essential that the entire community, or that any considerable portion of it, should directly enjoy or participate in the benefits to be derived from the purpose for which the property is appropriated. That it is enough if the taking tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community.

⁷⁸⁶ It is declared in said section of our constitution that the necessary use of lands to the complete development of the material resources of our state is a public use. And I think it clearly appears from the allegations of the complaint and the findings of the court that for the complete development of the vast lumber and timber interests of that section of the state along the Palouse river, the power of eminent domain may be exercised over said twelve and sixty hundredths acres of land. Our attention has not been called to any definition of the term "public use"—that is, a certain criterion to determine when the power of eminent domain may be exercised. In *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221, it was contended that the term "public use" should be distinguished from the term "public benefit," and that by "public use" was meant the possession, occupation and direct enjoyment by the public. In determining that question the court said: "It seems that such a limitation on the intention of this important clause would be entirely different from its accepted interpretation and would be as unfortunate as novel. One of the most important meanings of the word 'use' is

defined by Webster as 'usefulness,' 'utility,' 'advantage,' 'productive of benefit.' 'Public use' may, therefore, well mean public usefulness, utility, advantage; or what is productive of general benefit; so that an appropriation of private property by the state under its right of eminent domain for purposes of great advantage to the community is a taking for public use. Such, it is believed, is the construction which has uniformly been put upon the language by the courts, legislatures and legal authorities": See Words and Phrases Judicially Defined, p. 5828. It is further stated in *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221: "It is a subject (public use) which does not admit the definition, as the defined limits of to-day might not answer for the changed condition of to-morrow. . . . The power (of eminent domain) acquires a degree of elasticity to be capable of meeting new conditions and improvements of the ever-increasing necessities of society": See *Dayton Gold & Silver Min. Co. v. Seawell*, 11 Nev. 394. At page 787 5829 of volume 6, Words and Phrases Judicially Defined, the author cites a number of decisions under the following propositions: "The term 'public use' is flexible, and cannot be confined to the public use mentioned at the time of forming the constitution. All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain. Any use of anything which will satisfy reasonable public demand for facilities for travel, for transmission of intelligence or of commodities, would be a public use." That term is a flexible one, and necessarily has been of constant growth as new public uses have developed: *Randolph on Eminent Domain*, 35. And it has been said that what is a public use under eminent domain statutes will depend somewhat upon the nature and wants of the community for the time being: *Brown v. Gerald*, 100 Me. 391, 109 Am. St. Rep. 526, 61 Atl. 785, 70 L. R. A. 472.

There is no doubt when a person or corporation exercises the power of eminent domain, he or it assumes certain obligations to the public, and the grant of the right of eminent domain carries with it the right of public supervision and reasonable control. The improvement of said river is not for the use of the respondent alone, although under the conditions which exist it may be more benefited than others. But the river will be open to anyone who may have occasion to use it for floating logs and timber products. Under the provisions of section 835, Revised Statutes, the construction of

any dam or boom on any creek or river in this state that will unreasonably delay or hinder the floating or passage of timber down the same is prohibited: *Powell v. Springston Lumber Co.*, 12 Idaho, 723, 88 Pac. 97.

There are many streams in this state that will float logs or lumber during the flood time or spring freshets and will not do so during the time that such streams are at the ordinary stage or during low water. If it be true that all such streams are navigable under the provisions of said section 5210, and for that reason the right of eminent domain cannot be exercised with reference to such streams, the power therein given is a mere shadow, without any substance, and amounts to ⁷⁸⁸ nothing. For unless the stream is floatable for logs, there can be no good purpose or reason for storing logs in it or along it. The legislature well knew that many of our streams were floatable for logs in places, and not in others; it had in view those streams in the enactment of section 5210, and it intended to and did grant the right to exercise the power of eminent domain in order to make such streams floatable at places where they were not floatable unless improved by dams or otherwise. Shall we hold that the legislature did the foolish thing of granting the power of eminent domain on streams not floatable for logs and timber, and hold that it has neglected to do so on streams that might with a little improvement be made of great service in the transportation of logs and timber? A reasonable construction should be given to that section of our statute and constitution, and not one which would make the law ineffectual for any purpose whatever. And if, under the provisions of said section 14, article 1 of the constitution, the power of eminent domain may be exercised when "necessary to the complete development of the material resources of the state," and the lumbering interest is one of the material resources of the state, and that resource cannot be completely developed without the exercise of the power of eminent domain, then that power may be lawfully exercised. The legislature cannot annul that provision of the constitution by legislative enactment. The timber interest of our state is one of the great material resources of the state, and it is stated in said section 14 of the constitution as follows: "The necessary use of lands to the complete development of the material resources of the state is hereby declared to be a public use." But it is contended by counsel that said provision is not self-executing. We may con-

cede that contention. But the legislature has prescribed the procedure for subjecting land to a public use or for exercising the right of eminent domain. Thus by legislative enactment that provision of the constitution is made effective. The people in this constitution have declared that the necessary use of lands to the complete development of the material resources ⁷⁸⁹ of the state is a "public use," and the legislature has provided the procedure to subject such lands to that use. The complaint states a cause of action, and the judgment of the trial court must be sustained. Costs are awarded to the respondent.

Ailshie, J., concurs in the conclusion.

STOCKSLAGER, C. J., Concurring. I concur in the final conclusion reached, but not in all that is said, especially clause 11 of the syllabus. I think the constitution means "the same in the spring that it does in the fall."

NOTE.—Clause 11 of the syllabi thus referred to was the one declaring the elasticity of the power of eminent domain, making it capable of meeting new conditions and improvements.

A Statute Granting the Owner of Timber Lands the right to condemn a right of way over private property for logging roads and lumbering purposes is in violation of the constitutional provision prohibiting the taking of private property for a private use: Healy Lumber Co. v. Morris, 33 Wash. 490, 99 Am. St. Rep. 964; Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 111 Am. St. Rep. 779. See, also, Brown v. Gerald, 100 Me. 351, 109 Am. St. Rep. 526; Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 107 Am. St. Rep. 711; note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 829.

A Statute Authorizing the Taking of Land to improve the navigation of a stream is unconstitutional where the improvement of the navigability is intended to secure water power to be used for private purposes as well as to enable the carrying on of the transportation business: Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MARSHALL v. KEACH.

[227 Ill. 35, 81 N. E. 29.]

CORPORATION.—A Corporation De Facto Exists when the company has made an honest attempt to organize under a law authorizing it, and is doing business as an incorporated company, but has not recorded its certificate of incorporation. (p. 249.)

CORPORATION—Implied Warranty on Transfer of Stock.—There is no implied warranty on the part of a vendor of certificates of stock that the corporation issuing them is a corporation de jure as distinguished from a corporation de facto. (p. 250.)

CORPORATION—Implied Warranty on Transfer of Stock.—The term "inc." inserted after the corporate name of the vendor in a contract for the exchange of a farm for shares of stock in the corporation is not a warranty that the company is a corporation de jure. (pp. 248, 252.)

SPECIFIC PERFORMANCE—When Matter of Course.—When a contract is in writing, certain in its terms, based upon a valuable consideration, fair and just in all its provisions, and capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award damages for its breach. (p. 251.)

SPECIFIC PERFORMANCE—Waiver of Defenses.—During the pendency of negotiations for carrying out a contract to exchange properties, a party may waive such defenses as want of mutuality and time as the essence. (p. 252.)

Suit for the specific performance of a contract to exchange a farm for certificates of stock in a corporation. The principal defense urged was that the corporation issuing the stock was without legal existence because its certificate of incorporation had not been filed in the recorder's office.

F. K. Dunn and J. H. Marshall, for the appellant.

H. A. Neal, for the appellee.

42 CARTER, J. The main question in this case is whether, under the terms of the contract, appellant, directly or by implication, warranted that the Marshall Warehouse Company was a corporation de jure. Appellant contends that under the contract in question he gave no direct or implied warranty that the capital stock that he was selling was that of a corporation de jure; that the seller of negotiable securities of this kind only warrants that they belong to him and that they are not forgeries. He also contends that the Marshall Warehouse Company was a de facto corporation, and that the appellee is not in any way injured by the failure to have the certificate of incorporation recorded.

This court has held that to create a de facto corporation there must be a law under which said corporation may be created, together with user under the law: *American Trust Co. v. Minnesota etc. R. R. Co.*, 157 Ill. 641, 42 N. E. 153. We have also held that where there was an honest attempt of the corporators to organize a corporation under the laws of the state, and all the necessary steps had been **43** taken except that the final certificate had not been recorded by the recorder of deeds, and that thereafter the necessary officers had been elected, who had proceeded to the transaction of business as a corporate body, these facts would establish a corporation de facto: *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67, 27 N. E. 596. A corporation is a de facto one where the law authorizes such corporation and where the company has made an effort to organize under that law and is transacting business in the corporate name: 1 *Cook on Stock and Stockholders and Corporation Law*, 3d ed., sec. 234; 8 *Am. & Eng. Ency. of Law*, 2d ed., p. 747. The Marshall Warehouse Company had obtained a certificate from the Secretary of State, in due form, on May 8, 1900. From that time it had done business as an incorporated company, carrying on a general storage business, mostly as to broom corn. It issued warehouse certificates signed by the president and secretary, and procured and used a seal. Its officers received from the Secretary of State the customary notice as to the affidavit concerning trusts, in September, and the customary notice as to the annual report to be filed, in February, each year after the certificate was issued, which documents were appar-

ently filled out and returned in due course, with the required fee. Its officers also made out, and sent in the name of the company, a statement, as required by law, to the state board of equalization. So far as the record discloses, everything had been done by the company that the law required from the time the certificate had been received by the Secretary of State except the recording of the certificate, as required by section 4 of chapter 32: Hurd's Stats. 1905, p. 497. Manifestly, from this record the Marshall Warehouse Company was a de facto corporation.

Did the letters "inc." placed in parentheses in the contract in question, warrant that the stock was that of a corporation de jure, or was such warranty implied from the rest of the contract? The exact question here raised has ⁴⁴ never been decided by this court, although the powers and responsibilities of a de facto corporation, as well as the liabilities of the officers of such corporation, have frequently been discussed. A de facto corporation, as long as it exists, is a reality. It has a substantial legal existence: *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357; 8 Am. & Eng. Ency. of Law, 2d ed., p. 748, and cases there cited. This court has stated that it is the settled law that neither the eligibility of the directors of a de facto corporation nor the rightfulness of its existence could be inquired into collaterally: *Cincinnati etc. R. R. Co. v. Danville etc. R. Co.*, 75 Ill. 113, and cases there cited. See, also, *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324, 65 N. E. 329; *People v. Pederson*, 220 Ill. 554, 77 N. E. 251. It has been held by this court that proof of the existence of a corporation de facto is sufficient on a plea of null corporation: *Cozzens v. Chicago Brick Co.*, 166 Ill. 213, 46 N. E. 788; *Mitchell v. Deeds*, 49 Ill. 416. The introduction of the charter of a corporation, with the proof of the exercise under it of the franchises and powers thereby granted, is sufficient to establish the existence of a corporation de facto: *St. Louis etc. R. R. Co. v. Belleville City Ry. Co.*, 158 Ill. 390, 41 N. E. 916. The directors and officers of the de facto corporation are not relieved from the liability imposed by section 18 of said chapter 32 on corporations. "There must be a corporation de jure in order to escape that liability": *Butler Paper Co. v. Cleveland*, 220 Ill. 128, 110 Am. St. Rep. 230, 77 N. E. 99; *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99. It was held in *Gade v. Forest Glen Brick etc. Co.*, 165 Ill. 367, 46 N. E. 286, that the capital

stock of a corporation might be reduced before recording the final certificate in the recorder's office, and that creditors, after notice of the reduction of such capital stock, would be confined to the reduced capital, as they did not become creditors until after the certificate was recorded and the notice of the reduction published as required by law. This court has discussed various phases and duties of de facto corporations in ⁴⁵ *Curtis v. Tracy*, 169 Ill. 233, 61 Am. St. Rep. 168, 48 N. E. 399; *McCormick v. Market Nat. Bank*, 162 Ill. 100, 44 N. E. 381; *Edwards v. Armour Packing Co.*, 190 Ill. 467, 60 N. E. 807; *Gunderson v. Illinois Trust etc. Bank*, 199 Ill. 422, 65 N. E. 321; *Gay v. Kohlsaat*, 223 Ill. 260, 79 N. E. 77; *Hudson v. Green Hill Seminary*, 113 Ill. 618.

The supreme court of Indiana, in the case of *Harter v. Eltzroth*, 111 Ind. 159, 12 N. E. 129, had before it the identical question here under discussion, and there said that there was no implied warranty on the part of the vendor of certificates of stock that the corporation issuing them was a corporation de jure; that if the corporation was a de facto one that was sufficient to relieve the vendor from liability as to any implied warranty as to the existence of the corporation. To the same effect is 26 *American and English Encyclopedia of Law*, second edition, page 258. The Indiana court cited in support of its holding, *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496, where, in a case involving the sale of municipal bonds issued without statutory authority, in passing on the question of implied warranty the United States supreme court held: "The seller is liable ex delicto for bad faith, and ex contractu there is an implied warranty on his part that they belong to him and that they are not forgeries. Where there is no express stipulation there is no liability beyond this." The supreme court of Indiana, after this quotation from the *Otis* case (92 U. S. 447, 23 L. ed. 496), said: "A less liberal rule, clearly, cannot be applied to the sale and transfer of certificates of stock." This court in *Hinkley v. Champaign Nat. Bank*, 216 Ill. 559, 75 N. E. 210, held that the assignment of a judgment carries an implied warranty that the judgment is genuine, that it was entered in due form of law, but that there is no implied warranty that the judgment was impregnable to attack, and we there quoted with approval from the *Otis* case (92 U. S. 447, 23 L. ed. 496), the following: "If the buyer desires special protection he must take a guaranty. He can dictate its terms and refuse to buy unless it is given.

If not taken he cannot occupy the vantage ground upon which it would have placed him." In *Higgins v. Illinois Trust etc. Bank*, 193 Ill. 394, 61 N. E. 1024, we held that the vendor of stock in a corporation impliedly warranted that the same was genuine and that he was then the owner thereof and authorized to transfer title, and that if the assignee desires further protection he must exact a special guaranty.

Appellee insists that under the decision of *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99, and the cases there cited, the members or stockholders of a corporation which has not filed its certificate of incorporation, as required by section 4 of said chapter 32, are liable, as partners, for its acts or contracts, and the directors, officers and agents acting in its name render themselves personally liable, and that therefore the appellee ought not to be compelled to specifically perform this contract, as he himself would thereby become personally liable for the debts of the Marshall Warehouse Company; that the right to a specific performance is not an absolute one, but the contract must be perfectly fair, equal and just, and such as will commend itself to a court of equity; that this contract does not come within this doctrine. While the application for specific performance is addressed to the sound legal discretion of the court and will not be decreed as a matter of course, yet the discretion of the court in such cases must be exercised according to settled principles of equity, and not arbitrarily. "A court of equity will, as a matter of course, grant the specific performance of a contract for the conveyance of land where it is valid at law, fairly entered into and unobjectionable in any of its features which address themselves to the judicial discretion of the chancellor. In such case a court of equity is equally bound with a court of law to grant the appropriate relief when properly applied to for that purpose": *Fowler v. Fowler*, 204 Ill. 82, 68 N. E. 414. The sound judicial discretion—not arbitrary or capricious but controlled by established principles of equity—must be exercised upon a consideration of all the circumstances of each case. Where the contract is in writing, certain in its terms and for a valuable consideration, fair and ⁴⁷ just in all its provisions, capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award damages for its breach: 3 Pomeroy's Equity Jurisprudence, sec. 1404.

The stipulation in the contract that time should be of the essence was waived by the parties, and cannot be urged, under the facts presented in the record, as to the enforcement of this contract: *Watson v. White*, 152 Ill. 364, 38 N. E. 902; *Kissack v. Bourke*, 224 Ill. 352, 79 N. E. 619. Under the authority of this last case we think that the provisions of the contract as to the oil lease did not render it such an optional contract that it cannot be enforced. The lack of mutuality which is urged now by appellee was clearly waived by his conduct during the negotiations: *Gibson v. Brown*, 214 Ill. 330, 73 N. E. 578. There is nothing in the contract or pleadings that would raise the question as to the leasehold interest on the railroad right of way, and it therefore cannot be considered. There is no claim that there was fraud or deception of any kind on the part of appellant in the making of the contract in question or that the property of the Marshall Warehouse Company was not worth the consideration placed upon it in the contract. No judgments or debts existed against the corporation or Marshall himself. Under the holdings of this court as to de facto corporations, it is clear that the failure to file for record a copy of the certificate of organization within two years from the date of the license, when the corporation had proceeded, under the certificate, to transact business, as shown by this record, would not be deemed a forfeiture of the license. Under such a state of facts a copy of the certificate could still be filed for record with the recorder of the county and the corporation would then be fully organized de jure.

We are of the opinion, under the authorities, that by this contract appellant did not warrant that the certificates of stock were issued by a de jure corporation. It is apparent⁴⁸ from the record in this case that the transaction was fair and open in all particulars, and that appellee has no valid objection, on the merits, to the carrying out of the contract. As has been repeatedly said by this and other courts, if he desired the warranty he is now contending for he should have inserted it in the contract before it was executed. Appellant's offer to carry out the contract was in accordance with its terms as modified and sanctioned by both parties.

The decree of the circuit court will therefore be reversed and the cause remanded for further proceedings in accordance with this opinion.

WHAT CONSTITUTES A CORPORATION DE FACTO.*

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I. Definition of Corporation De Facto.

A de facto corporation is one existing under color of law: *Foster v. Hare*, 26 Tex. Civ. App. 177, 62 S. W. 541. The expression is ordinarily used to denote associations exercising corporate powers under color of more or less legal organization: *Brown v. Atlanta Ry. etc. Co.*, 113 Ga. 462, 39 S. E. 71. "A corporation de facto exists when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by the law, when there is an organization with color of law, and the exercise of corporate franchises": *Snider Sons' Co. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887, 8 South. 658, 11 L. R. A. 515; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907, 31 South. 81; *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232, 19 South. 172, 31 L. R. A. 484; *McTighe v. Macon Const. Co.*, 94 Ga. 306, 47 Am. St. Rep. 153, 21 S. E. 701, 32 L. R. A. 208; *Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362.

A corporation de facto is a corporation from the fact of its acting as such, though not in law or of right a corporation. Although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be and act as a corporation, it may be so far a corporation that, for reasons of

***REFERENCE TO MONOGRAPHIC NOTES.**

Defective formation of corporations: 88 Am. St. Rep. 176.

Transactions in name of supposed but nonexistent corporations: 94 Am. St. Rep. 593.

public policy, no one but the state will be permitted to call in question the lawfulness of its organization: *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552, 53 N. W. 1150, 18 L. R. A. 778; *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526. "The theory that a de facto corporation has no real existence, that it is a mere phantom to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A de facto corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation": *Society Perun v. Cleveland*, 43 Ohio St. 485, 3 N. E. 357.

II. General Essentials of Such Corporation.

The authorities are generally agreed that to constitute a corporation de facto three requisites are essential: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) a bona fide attempt to organize thereunder; and (3) an actual user of the corporate franchise: *Duggan v. Colorado M. & I. Co.*, 11 Colo. 113, 17 Pac. 105; *State v. Byrne*, 45 Conn. 273; *Cincinnati etc. R. R. Co. v. Danville etc. Ry. Co.*, 75 Ill. 113; *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569; *Johnson v. Okcrstrom*, 70 Minn. 303, 73 N. W. 147; *Methodist etc. Church v. Pickett*, 19 N. Y. 482; *Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; *McLeary v. Dawson*, 87 Tex. 524, 29 S. W. 1044; *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. Rep. 531, 46 L. ed. 773. "Where the law authorizes a corporation, and there is an effort in good faith to organize a corporation under the law, and thereupon, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation de facto": *Hasselman v. United States Mtg. Co.*, 97 Ind. 365; *North v. State*, 107 Ind. 356, 8 N. E. 159. "Where it is shown that there is a charter or a law under which a corporation, with the powers assumed, might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation is established": *Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362. "Where the law authorizes a corporation, and there has been an attempt in good faith to organize, and corporate functions are thereafter exercised, there exists a corporation de facto": *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85.

"It is essential to the existence of a corporation de facto that there be (1) a valid law under which a corporation with the powers assumed might be incorporated; (2) a bona fide attempt to organize a corporation under such law; and (3) an actual exercise of corporate powers": *Clark v. American Cannel Coal Co.*, 165 Ind. 213, 112 Am. St. Rep. 217, 73 N. E. 1083. "To constitute a de facto corporation, there must be either a charter or a law authorizing the

creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user or attempt to exercise corporate powers under it": *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220, 40 Pac. 457, 29 L. R. A. 143. "Where a statute exists under which parties may lawfully incorporate, and an attempt is made to organize thereunder, and, especially where the organization has assumed and for a long time has exercised the corporate powers which a compliance with the statute would have conferred, it has acquired a colorable right to exist, even though it may be discovered that the incorporation was for some reason defective. It is a corporation *de facto*, and must be so regarded in all collateral proceedings": *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081.

III. Existence of Law Authorizing Corporation.

a. **Necessity of Such Law.**—The first condition essential to the formation of a corporation *de facto* is the existence of a law authorizing the organization of a corporation such as it purports to be. If there is no such law, there can be no corporation *de facto*: See the principal case; *American L. & Trust Co. v. Minnesota etc. R. R. Co.*, 157 Ill. 641, 42 N. E. 153; *State v. Stevens*, 16 S. Dak. 309, 92 N. W. 429; *Davis v. Stevens*, 104 Fed. 235. "A corporation *de facto* cannot exist in any case where there is no law authorizing a *de jure* corporation. And where there is no grant of power existing for the creation of the corporation pretended to be organized, there can be no *de facto* corporation, and in a suit by such pretended corporation upon a contract executed by it, the other party to the contract is not estopped to deny the corporate existence at the date of the contract": *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 72 Am. St. Rep. 326, 54 N. E. 407. It is obvious that a *de facto* corporation cannot be recognized in violation of a positive law: *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220, 40 Pac. 457, 29 L. R. A. 143.

b. **Unconstitutional Law or Charter.**—Some courts seem inclined to assert that an unconstitutional statute can give color to corporate existence and form the basis of a corporation *de facto*: *Richards v. Minnesota Sav. Bank*, 75 Minn. 196, 77 N. W. 822; *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400. Other courts, however, affirm that there cannot be a corporation *de facto* under an unconstitutional statute, since such a statute is void and in legal contemplation no law at all: *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562; *Clark v. American Cannel Coal Co.*, 165 Ind. 213, 112 Am. St. Rep. 217, 73 N. E. 1083; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; *Haber v. Martin*, 127 Wis. 412, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 3 L. R. A., N. S., 653. Said the supreme court of Georgia in *McTighe v. Macon Const. Co.*, 94 Ga. 306, 47 Am. St. Rep. 153, 21 S. E. 701, 32 L. R. A. 208: "We may assume, without further cita-

tion of authorities, and without attempting any argument on the subject, that where the existence of a corporation of a given kind is positively forbidden by law, or where there is no valid, constitutional law authorizing the creation of such a corporation, it cannot exist even as a corporation de facto. The rule thus stated does not, by any means, however, negative the soundness of the proposition that an organization assuming to be a corporation de jure, but for sufficient reasons not so in fact, may be a corporation de facto when it is of such a character that it could, under existing laws, have full and complete corporate being and powers." The court then holds that a corporation, though organized and acting under an unconstitutional special charter, may still be a de facto corporation (citing *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83; *St. Louis v. Shields*, 62 Mo. 247), if there exists a general law under which it might effect a valid incorporation.

c. Impossibility of Corporation De Jure.—There cannot be a corporation de facto where there cannot be a corporation de jure. This is but another way of saying that there cannot be a de facto corporation when there is no law which authorizes the organization or existence of a corporation such as it purports to be: *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232, 19 South. 172, 31 L. R. A. 484; *McTighe v. Macon Const. Co.*, 94 Ga. 306, 47 Am. St. Rep. 153, 21 S. E. 701, 32 L. R. A. 208; *Bradley v. Reppell*, 133 Mo. 545, 54 Am. St. Rep. 685, 32 S. W. 645, 34 S. W. 841. An attempt to do that which the law does not permit can produce no result that the law will recognize: *Whaley v. Bankers' Union* (Tex. Civ. App.), 88 S. W. 259.

d. Expiration of Corporate Existence.—Upon the expiration of the term of the corporate existence of a company as fixed by the law or its charter, it is dissolved ipso facto; and a corporation whose existence has thus expired by the terms of the law creating it is not a corporation de facto: *Clark v. American Cannel Coal Co.*, 165 Ind. 213, 112 Am. St. Rep. 217, 73 N. E. 1083; *Bradley v. Reppell*, 133 Mo. 545, 54 Am. St. Rep. 685, 32 S. W. 645, 34 S. W. 841.

e. Consolidation of Corporations.—Where corporations of different states attempt to consolidate without a law authorizing their consolidation, and assume to act as a consolidated corporation in the belief that they are legally incorporated, a corporation de facto is not thereby created. An attempted consolidation in the absence of legislative authority is a nullity: *American Loan etc. Co. v. Minnesota etc. R. R. Co.*, 157 Ill. 641, 42 N. E. 153; *Whaley v. Bankers' Union* (Tex. Civ. App.), 88 S. W. 259. "And the corporate existence of a nominally consolidated corporation formed in the absence of legislative authority for such consolidation may be collaterally attacked, its acts and contracts are void, and it cannot be held liable for the debts of one of the corporations attempting

to consolidate": *Whaley v. Bankers' Union* (Tex. Civ. App.), 88 S. W. 259.

If there is a statute authorizing the consolidation of corporations, a substantial compliance therewith by several corporations, followed by an exercise of corporate functions by the consolidated company, will constitute it a *de facto* corporation: *Atchison etc. R. R. Co. v. Board of Commissioners of Sumner County*, 51 Kan. 617, 33 Pac. 312.

IV. Compliance with Law in Organizing Corporation.

a. **Colorable Compliance in General.**—The mere fact, however, that there is a law under which a corporation might be created, and that the parties have agreed among themselves to act, and have acted, as a corporation, is not enough to constitute them a corporation *de facto*. There must also be at least a colorable compliance with the law authorizing the formation of a corporation. If no attempt is made to organize under the law, the concern does not amount even to a *de facto* corporation; for to establish a corporation *de facto*, the existence of a law authorizing its formation, proceedings taken for that purpose in professed compliance with the law, and acts of subsequent user are indispensable; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147; *Bradley Fertilizer Co. v. South Pub. Co.*, 4 Misc. Rep. 172, 23 N. Y. Supp. 675; *City of Guthrie v. Wylie*, 6 Okla. 61, 55 Pac. 103; *Allen v. Long*, 80 Tex. 261, 26 Am. St. Rep. 735, 16 S. W. 43. An unincorporated bank exclusively owned by one person is not a corporation *de facto*, though the business is conducted by a president and cashier: *Longfellow v. Barnard*, 59 Neb. 455, 81 N. W. 307. And when partners agree to transact business as a corporation, fulfilling some of the statutory requirements of incorporation, but omitting certain essentials, with the intention to stop short of the creation of a corporation, a corporation *de facto* is not formed: *Card v. Moore*, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed in 173 N. Y. 598, 66 N. E. 1105.

But when there has been a colorable, though not a full, compliance with the law in forming a corporation, and an exercise of the rights claimed by virtue of such corporation, the existence of a corporation *de facto* is established, notwithstanding defects or irregularities in its formation or organization: *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 207, 31 South. 81; *Stockton etc. Road Co. v. Stockton etc. R. R. Co.*, 45 Cal. 680; *Porter v. Sherman County Banking Co.*, 36 Neb. 271, 54 N. W. 424; *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680; *Marsh v. Mathais*, 19 Utah, 350, 56 Pac. 1074; *Supreme Court L. O. Foresters v. Supreme Court U. O. Foresters*, 94 Wis. 234, 68 N. W. 1011. "Color of apparent organization under some charter or enabling act does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A

substantial compliance will make a corporation de jure. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body from being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto': *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552, 53 N. W. 1150, 18 L. R. A. 778; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147.

b. Eligibility of Incorporators.—When persons assume to act as a body, and are permitted by acquiescence of the public to act, as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by general law, such body of persons constitutes a corporation de facto, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so: *Continental Trust Co. v. Toledo etc. R. R. Co.*, 82 Fed. 642. Thus, where the articles of incorporation filed in the office of the Secretary of State are signed by persons none of whom are citizens of the state, when the statute requires that at least two of the subscribers to the charter of an intended corporation must be citizens of the state, the organization amounts to a corporation de facto: *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 26 Am. St. Rep. 743, 15 S. W. 1038.

c. Signing and Acknowledgment of Articles.—Articles of incorporation drawn in due form and signed in the manner required by statute, except as to the acknowledgment, will sustain a corporation de facto: *Keyes v. Smith*, 67 N. J. L. 190, 51 Atl. 122; *Franks v. Mann*, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856. It has been decided, however, that where the statute requires the articles to be subscribed and acknowledged by five or more persons, and they, though subscribed by five persons, are acknowledged by four only, this defect is fatal to the existence of the corporation in a proceeding against it by quo warranto: *People v. Montecito Water Co.*, 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172, and see the note thereto at page 178. The fact that one of the signers apparently affixed his name as an officer of another association or corporation (*Keene v. Van Reuth*, 48 Md. 184), or that a certificate or affidavit attached to the articles does not comply with the statute (*Lord v. Essex Bldg. Assn.*, 37 Md. 320; *Buffalo etc. R. R. Co. v. Cary*, 26 N. Y. 75), does not disprove the existence of a corporation de facto.

d. Residence of Incorporators and Place of Business.—The omission to state in the articles of incorporation the place where its business is to be carried on will not prevent the organization from constituting a corporation de facto: *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552, 53 N. W. 1150, 18 L. R. A. 778. Neither does the omission to state the place of residence of the incorporators:

Snider's Sons Co. v. Troy, 91 Ala. 224, 24 Am. St. Rep. 887, 8 South. 658, 11 L. R. A. 515.

e. Filing of Articles of Incorporation.—An entire failure to file the articles of incorporation in the office specified by law is by some courts held to preclude any claim to a de facto existence: *McLennon v. Hopkins*, 2 Kan. App. 260, 41 Pac. 1061; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Capps v. Hastings Prospecting Co.*, 40 Neb. 470, 42 Am. St. Rep. 677, 58 N. W. 956, 24 L. R. A. 259. The decisions of other courts, however, seem to lend themselves to a contrary and perhaps more reasonable interpretation: *Bakersfield Town Hall Assn. v. Chester*, 55 Cal. 98; *Farmers' Ins. Co. v. Borders*, 26 Ind. App. 491, 60 N. E. 174; *Granby Min. etc. Co. v. Richards*, 95 Mo. 106, 8 S. W. 246. A colorable or substantial compliance with the law in the matter of filing articles of incorporation is sufficient to sustain a corporation de facto. Hence, where the articles are filed with the county clerk or county recorder, a failure also to file them with the Secretary of State does not preclude the existence of a corporation de facto: *Grand River Bridge Co. v. Rollins*, 13 Colo. 4, 21 Pac. 897; *Portland etc. Turnpike Co. v. Babb*, 88 Ky. 226, 10 S. W. 794; *Lusk v. Riggs*, 70 Neb. 718, 102 N. W. 88. Where the articles are filed with the county clerk, but he copies them in the wrong book, the company is at least a corporation de facto: *Walton v. Riley*, 85 Ky. 413, 3 S. W. 605. And the filing of the original articles when the law requires a verified copy of them (*Slocum v. Head*, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324), or the filing of a certified copy of the articles with the proper depository instead of a duplicate, as the statute requires (*Hudson v. Green Hill Cemetery*, 113 Ill. 618; *Nelson v. Blakey*, 54 Ind. 29; *Williamson v. Kokomo Bldg. etc. Assn.*, 89 Ind. 389), does not prevent the formation of a corporation de facto. The mere recording of the articles with the certificate of the election of officers, without the intention or fact of the papers themselves remaining in the office, is not a sufficient filing to complete the organization of the corporation or vest it with corporate powers: *Bergeron v. Hobbs*, 96 Wis. 641, 65 Am. St. Rep. 85, 71 N. W. 1056.

f. Filing of Certificate of Incorporation.—The failure of a corporation to file its certificate of organization with the county recorder in the county of its principal place of business (see the principal case; *Bushnell Consolidated Ice Machine Co.*, 138 Ill. 67, 27 N. E. 596; *Curtis v. Meeker*, 62 Ill. App. 49; *Edwards v. Cleveland Dryer Co.*, 83 Ill. App. 643), or with the Secretary of State (*Vanneman v. Young*, 52 N. J. L. 403, 20 Atl. 53; *McCarter v. Ketcham*, 72 N. J. L. 247, 62 Atl. 693; *Farmers' Loan etc. Co. v. Toledo etc. Ry. Co.*, 67 Fed. 49), as required by statute, does not preclude the company from having a de facto existence. See, too, *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907, 31 South. 81.

g. Payment of Fee or Tax.—It is decided, in *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220, 40 Pac. 457, 29 L. R. A.

143, that a company, intended as a corporation, which has failed to comply with the statute requiring it to file its certificate of incorporation with the Secretary of State, and to pay the fee therefor, is neither a de jure nor a de facto corporation. The statute in that case provided that every corporation incorporated under any general or special law should pay to the state a fee to be due upon the filing of the certificate of incorporation, and that no such corporation should have or exercise any corporate powers until such fee was paid. Said the court: "The language of the act is plain and unambiguous. The doctrine of estoppel cannot be successfully invoked unless the corporation has at least a de facto existence. A de facto corporation can never be recognized in violation of a positive law. There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisites to the exercise of such powers." The decision of the Colorado court has been approved in *Maryland Tube etc. Works v. West End Imp. Co.*, 87 Md. 207, 39 Atl. 620, 39 L. R. A. 810. In both of these decisions the corporations were attempting to maintain actions without having complied with the statute in the matter of paying the requisite fee or tax. In Alabama the mere failure to pay the incorporation fee required by statute does not prevent a company from becoming a corporation de facto: *Christian etc. Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340, 25 South. 566; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907, 31 South. 81.

h. **Subscription to Stock.**—The fact that in the organization of a corporation no formal stock books were opened or stock subscribed does not preclude the existence of a corporation de facto: *Jones v. Hale*, 32 Or. 465, 52 Pac. 311. And the right of a corporation to act as such cannot be attacked in a collateral proceeding by proving that certain subscriptions to its capital stock have not been paid in cash, but in securities: *Roane Iron Co. v. Wisconsin Trust Co.*, 99 Wis. 273, 67 Am. St. Rep. 856, 74 N. W. 818.

V. User of Corporate Rights or Powers.

The third requisite of a corporation de facto is a user of its corporate franchise or privileges. It is essential to the existence of a corporation de facto, not only that there should be a law authorizing the formation of such a corporation as it purports to be and a colorable compliance with that law in organizing the corporation, but also that there should be a discharge of the corporate functions or a performance of the business contemplated by the charter or articles of incorporation. When such a user is established, the company may constitute a corporation de facto, notwithstanding its organization is defective: *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 South. 611; *Thompson v. Candor*, 60 Ill. 244; *Willard v. Trustees of M. E. Church*, 66 Ill. 55; *Holt v. Tennent-Stribling Shoe Co.*, 69

Ill. App. 332; Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Union Water Co. v. Kean, 52 N. J. Eq. 111, 27 Atl. 1015; Buffalo etc. R. Co. v. Cary, 26 N. Y. 75; Lammig v. Galusha, 81 Hun, 247, 30 N. Y. Supp. 767; De Witt v. Hastings, 40 N. Y. Super. Ct. (8 Jones & S.) 463; Masters v. Umpqua Valley Oil Co. (Or.), 90 Pac. 151; Leavengood v. McGee (Or.), 91 Pac. 453; Mitchell v. Jensen (Utah), 81 Pac. 165.

A sufficient user of corporate rights to impart the character of a corporation de facto to a body of men who have attempted to organize under the law is shown by the collection of subscriptions to the capital stock, the election of officers, the adoption of by-laws, the purchase of a lot, the erection of a building thereon, and the demise of portions of the building to various tenants: Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 53 N. W. 1150, 18 L. R. A. 778.

The mere user of corporate rights, or the mere assumption of corporate capacity, without a colorable compliance with the law in effecting the formation of the pretended corporation, will not constitute the association a corporation de facto: Van Buren v. Reformed Church, 62 Barb. 495. The fact that the owners of a mine use a corporate name does not constitute a corporation, when no corporate acts have been performed and no steps taken to incorporate: Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462.

MILLER v. RIDDLE.

[227 Ill. 53, 81 N. E. 48.]

RELIGIOUS SOCIETY.—To Constitute a Religious Society, there must be a membership of persons associated together, which collectively constitutes the society, with such officers as are required, or at least a definite collective body acting as a society. (p. 264.)

RELIGIOUS SOCIETY—Dissolution by Abandonment.—If a religious society has no pastor for fifteen years, and during that time has no meeting or religious service of any sort, an inference of abandonment follows from the absence of a collective body associated together, and the association should be regarded as dissolved and out of existence. (pp. 264, 265.)

RELIGIOUS SOCIETY.—Dissolution by Abandonment—Reversion of Funds to Heirs.—Where a religious society which was the beneficiary of a testamentary trust fund is dissolved by reason of an abandonment of its purposes and functions for many years, such funds revert to the heirs of the testatrix; and the action of several persons who had been members of the society, after a bill has been filed by the heirs to construe the will and determine the ownership of the funds, in electing three trustees is insufficient to recreate the former organization or reinvest it with the right to the property. (p. 265.)

John E. Pollock, Henry D. Spencer and Monroe & Schoch, for the appellants.

Welty, Sterling & Whitmore, for the appellees.

⁵⁴ CARTWRIGHT, J. Esther Ireland died in 1879, leaving a last will and testament, by which, in addition to providing for the payment of funeral expenses and just debts and making some small bequests, she gave all her remaining real and personal estate to her nephew, John Livingston, and Cornelia Livingston, his wife, and the survivor of them, during their lives. John Livingston was given power to sell the real estate or have an administrator appointed to do so, and if he did not exercise the power an administrator was to be appointed upon the termination of the life estate, who should make such sale as directed in the will. Out of the proceeds of such sale two hundred dollars was to be paid to Francis Webber and one thousand dollars ⁵⁵ to Elder H. H. Ballard, who was to have the interest on that sum annually but was not to use the principal during his lifetime. The balance of what might be realized from the sale of the real estate was left for the following purposes, as expressed in the will: "As a permanent fund for the benefit of the Baptist Church at Old Town, to be in the hands of the trustees of the said church like a school fund, said church being the place of my membership. The above fund to be subject to the same rules and legal regulations as a school fund, and the trustees shall apply the interest from time to time, as may be needed, to support the church in the ministration of the Word and otherwise, or for needed repairs." Elder Ballard, who at the time of making the will, in 1879, was the pastor of the Baptist Church at Old Town, died before the death of the life tenants, and the life estate came to an end without a sale having been made. The appellee Earl Riddle was then appointed, on December 28, 1903, administrator with the will annexed of the estate, and filed his bill in this case in the circuit court of McLean county to obtain a construction of the will as to whether the bequest of Elder Ballard had lapsed and to whom the proceeds of the real estate should be paid. The bill alleged that there had been no services in the church mentioned in the will for a period of fifteen years; that the building had become dilapidated and the roof was substantially gone, and that said Francis Webber was the only person living who had been a trustee of the church. The bill made Francis Webber and the heirs of Ballard and the heirs of the testatrix de-

fendants, and certain minor heirs of the testatrix afterward became parties complainant by their next friends. Some of the heirs answered, claiming that the legacy to Ballard had lapsed and that the Baptist Church at Old Town had ceased to exist and the religious society had been dissolved. After the bill was filed, eleven persons who had been members of the religious society had an election for trustees and elected three persons as such trustees, who, together ⁵⁶ with the members, were made defendants by a supplemental bill. Neither the trustees nor members answered the bill and they were defaulted. The court heard evidence and entered a decree establishing the right of the present society and its trustees to the fund. From that decree an appeal was taken by heirs of Esther Ireland to the appellate court for the third district. The trustees and church members who had been defaulted in the circuit court did not appear in the appellate court or file any brief there, and that court reversed the decree under a rule of the court for that reason and the cause was remanded to the circuit court. The cause was redocketed on notice to the parties, and the bill was amended by alleging the invalidity of the election of trustees after the bill was filed and after the right to the fund had become vested in the heirs of the testatrix. The trustees and members who were defendants were ruled to answer, but none of them answered or made any defense, and they were defaulted. The court entered a decree finding that ten members of the church were still living in the vicinity; that since the filing of the original bill they had reorganized and elected new trustees, and that they were entitled to the fund, and ordering it paid to such trustees or a trustee appointed by the court, to be used as a permanent fund for the benefit of the church. From that decree an appeal was again taken by appellants, who are heirs of the testatrix, to the appellate court for the third district, where the decree was affirmed, and a further appeal was prosecuted to this court.

Appellants have filed a brief and argument in support of the errors assigned upon the record, and the administrator has filed his statement that he is indifferent as between the parties and only desires the direction of the court, but neither the trustees nor the members of the church have appeared or filed any brief or argument. The default admitted the material allegations of the bill, and whether the trustees or members are claiming any right to the fund does not appear.

⁵⁷ The facts proved are substantially as follows: The Old Town Baptist Church, or the Baptist Church of Old Town Timber, of McLean county, was an unincorporated religious society organized prior to 1858. The requirements of the statute for the incorporation of religious societies were never complied with, but a certificate of election of trustees on September 11, 1858, was filed in the recorder's office and another certificate was filed in 1862. No certificate of the election of trustees was afterward filed and the last trustees were elected in the year 1878. The society continued in existence and held religious services until about fifteen years before the bill was filed, when all such services and meetings of the society ceased. When the bill was filed the church building was decayed, the sills were rotten, the plaster was entirely off the ceiling and mostly off the walls, the window sashes had been knocked out and the roof was full of holes. The whole building was worth about thirty or forty dollars. There were still in the vicinity eight women and three men who had been members of the church, and after this suit was commenced they elected three trustees, but did not resume religious meetings or take any other steps toward keeping up the society.

The voluntary religious society which was made beneficiary of the will was in existence and exercising the functions for which it was organized when the testatrix died and the will became operative, but if it has since been dissolved the property given by the will for its use has reverted to the heirs at law of the testatrix: *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *Presbyterian Church v. Venable*, 159 Ill. 215, 50 Am. St. Rep. 159, 42 N. E. 836; *Kales on Future Interests*, sec. 126. There was no dissolution of the society by the consent or agreement of its members, but undoubtedly there may be a dissolution by abandonment and nonuser. In order to constitute a religious society there must be a membership of persons associated together, which collectively constitutes the society, with such officers as are required, or at least a definite collective ⁵⁸ body acting as a society: *Marie M. E. Church v. Trinity M. E. Church*, 205 Ill. 601, 69 N. E. 73. If there is no such definite collective body associated together, acting as a society for such a period of time that an inference of abandonment necessarily follows, the association should be regarded as dissolved. It cannot be regarded as having a continued existence after permanently abandoning

the purpose of its creation and ceasing to exercise the functions for which it was organized. In this case there was no pastor of the church for fifteen years, and there was no meeting or religious service of any sort during all that time. There was no collection of persons meeting together for religious worship or performing any of the functions, social or religious, of an organized society. The facts proved would justify no other inference than that the society was dissolved and ceased to exist. Upon such dissolution the property reverted to the heirs at law of the testatrix, but after the bill was filed eleven persons who had been members of the society met and elected three trustees. In our opinion this action was not sufficient to recreate the former organization or reinvest it with a right to the property. If that could be done it would not be necessary to do anything more for another period of fifteen years, when the survivors might again elect trustees. There was nothing in the nature of a religious society or collective body sustaining church services or fulfilling any of the purposes of such society for many years before the bill was filed, and we conclude that the court erred in establishing the right of the defendants, assuming to constitute the church, to the fund in question.

The judgment of the appellate court and the decree of the circuit court are reversed and the cause is remanded to the circuit court, with directions to enter a decree in accordance with the views herein expressed.

A Church is a Voluntary Association of members, united together by covenant or agreement, for the purpose of maintaining the public worship of God, observing the ordinances of His house, the promotion of spirituality of its membership, and the spread of divine truth among others: *Hundley v. Collins*, 131 Ala. 234, 90 Am. St. Rep. 33.

The Reversion of the Property of a corporation or society to the grantor or his heirs upon the dissolution of the association is discussed in *Wilson v. Leary*, 120 N. C. 90, 58 Am. St. Rep. 778; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192; *Presbyterian Church v. Venable*, 159 Ill. 215, 50 Am. St. Rep. 159; *Board of Education v. Edson*, 18 Ohio St. 221, 98 Am. Dec. 114.

DOWIE v. SUTTON.

[227 Ill. 183, 81 N. E. 395.]

WILL CONTEST—Appeal.—In a Proceeding in Chancery to contest a will which disposes of real estate or real and personal property, an appeal lies directly to the supreme court; but if the will disposes of personal property only, the appeal goes from the trial court to the appellate court, for the reason that a freehold is not involved. (p. 267.)

WILL CONTEST.—The Verdict of the Jury in will contests in chancery is binding upon the chancellor, having the same force and effect as a verdict at law. It is not advisory merely. (p. 267.)

WILL CONTEST.—When an Appeal from a will contest in chancery is taken to the appellate court, the affirmance of the decree by that court has the same effect as a final determination of the facts as the affirmance by it of a judgment at law. (p. 268.)

TESTAMENTARY CAPACITY—Letter as Evidence of Delusion.—A letter written by a testator to his sister a few months prior to the execution of his will, disclosing his belief that all women were attempting to poison him, and that she is one of the "murderers," is admissible in evidence to show that he was suffering from an insane delusion, without extrinsic proof as to where it was written or as to whether it was sent to the addressee. (p. 271.)

TESTAMENTARY CAPACITY.—An Instruction to the Jury that to make a valid will the testator must be capable of knowing what his property is, who are the natural objects of his bounty, and be able to understand the nature, consequence and effect of his act; and that "all of these elements must concur, and the absence of any one of them will render such person incompetent to make a will," does not require him to be able to hold all such elements in his mind at the same time, and is therefore not improper. (p. 272.)

TESTAMENTARY CAPACITY—Undue Influence.—An instruction to the jury that if a testator, when executing his will, was "so far under the dominion of any person as to prevent the free exercise of his judgment," he was not of disposing mind and memory, is not erroneous in failing to qualify "dominion" by "wrongful." (p. 273.)

TESTAMENTARY CAPACITY.—Undue Influence or dominion is such influence as deprives the testator of his free agency or volition. (p. 275.)

TESTAMENTARY CAPACITY.—One may have Capacity to attend to the ordinary business affairs of life and yet be without capacity to make a will, if he is insane with reference to the subjects connected with the testamentary disposition of his property and the natural objects of his bounty. (p. 277.)

TESTAMENTARY CAPACITY—Evidence of Surrounding Facts.—When want of testamentary capacity, undue influence, or fraud is charged, all the surrounding facts, including the will itself, its propriety or impropriety, its reasonableness or unreasonableness, in view of the situation, relations and circumstances of the testator, may be considered as bearing upon the issues raised. (p. 278.)

WILL CONTEST—Church not Necessary Party.—Where a bequest for the benefit of a church is made to a certain person and his successors, as overseers of the church, with power to dispose of the estate in furtherance of the object of the bequest, no trust being expressed, the church is not a necessary party to a bill to contest the will. (p. 279.)

WILL CONTEST—Costs Against Executor.—The estate of a testator cannot be drawn upon to reimburse the executor in an unsuccessful attempt to uphold the will when attacked by a bill in chancery. (p. 279.)

Bill in equity praying that an instrument which had been admitted to probate as the last will of Frederick Sutton, and the probate thereof, should be set aside, and his property be distributed as intestate estate. The bill charged a want of testamentary capacity and also the exercise of undue influence. The jury returned a verdict that the instrument in question was not the will of Frederick Sutton, and the court entered a decree in accordance therewith, from which an appeal was taken to the appellate court, where the decree was affirmed. A further appeal was then taken to this court.

V. V. Barnes, Charles E. Lauder and P. R. Barnes, for the appellant.

Bulkley, Gray & More, Jule F. Brower, and Samuel B. King, for the appellees.

120 VICKERS, J. Counsel for both parties have submitted extended briefs and arguments upon the questions of fact involved in the issue submitted to the jury. Presumably this course is pursued upon the supposition that these questions are open for review in this court. This is a misapprehension of the law applicable to this case. In a proceeding to contest a will by bill in chancery, when the will purports to dispose of real estate or real and personal property, the appeal lies direct to this court, for the reason that a freehold is involved; but where the will only purports to dispose of personal property, as is the case here, the appeal goes from the trial court to the appellate court for the reason that a freehold is not involved. The appeal in the case at bar was properly taken to the appellate court.

The law is well settled in this state that when a will is contested by a bill in chancery and an issue of law is made up and submitted to a jury, as provided by section 7 of the statute of wills, the verdict of the jury has the same force and effect as a verdict on an issue of fact in a law case. In

this respect chancery proceedings to contest wills are an exception to the general rule applicable to the trial of an issue of fact out of chancery by a jury. The general rule is, that the verdict of a jury on a feigned issue out of chancery is merely advisory to the chancellor, who may disregard the verdict and render a decree according to his own findings, or he may follow the verdict and base his findings thereon: *Fanning v. Russell*, 94 Ill. 386. But in cases of contests of wills in chancery the verdict of the jury is binding upon the chancellor. It has the same force and effect as a verdict at law. The chancellor may set aside the verdict and grant a new trial for cause, as in law cases, but he may not disregard it and enter a decree non obstante veredicto, as may be done on a feigned issue under the general chancery practice: *Calvert v. Carpenter*, 96 Ill. 63; *Shevalier v. Seager*, 121 Ill. 564, 13 N. E. 499; *Moyer v. Swygart*, 125 Ill. 262, 17 N. E. 450; *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *Bradley v. Palmer*, 193 Ill. 15, 61 N. E. 856. The effect of the verdict in such cases being the same as in cases at law, when a case is appealed to the appellate court and the decree is there affirmed, the affirmance of such decree by the appellate court has precisely the same effect, as a final determination of the facts, as the affirmance by such court of a judgment at law.

In the case of *Long v. Long*, 107 Ill. 210, Mr. Justice Mulkey announced the effect of the affirmance of the decree by the appellate court, as follows: "The rule is well settled by the previous decisions of this court, that in contested will cases like the present the finding of the jury is conclusive unless clearly against the weight of evidence (*Brownfield v. Brownfield*, 43 Ill. 147; *Meeker v. Meeker*, 75 Ill. 260; *Calvert v. Carpenter*, 96 Ill. 63); and in this respect they are put upon the same footing with cases at law. Such being the case, it would seem to follow—and we so hold—the finding of the appellate court in conformity with the verdict of the jury is conclusive upon all questions of fact. Ordinarily the finding of facts by the appellate court in a chancery proceeding is not conclusive on this court; but this class of cases, under the construction given to our statute, does not fall within the general rule, but such cases are treated in this respect, as we have already seen, as actions at law."

There might have been a motion for a peremptory instruction directing the jury to find for appellants at the close of

all the evidence, as held by this court in *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645, *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321, and *Woodman v. Illinois Trust etc. Bank*, 211 Ill. 578, 71 N. E. 1099, which would have saved the question whether there was any evidence fairly tending to sustain the bill, but no such motion was made. Therefore the affirmance of the decree below by the appellate court having settled all controverted questions ¹⁹² of fact in favor of the appellees, the only questions presented for our consideration are raised by exceptions to the ruling of the court on questions of law.

2. The only ruling of the court as to the admission of testimony which is urged in this court as error was with respect to a certain letter which was shown to have been written by the testator to his sister, residing in New Zealand. From 1862 to August 12, 1901, the testator was a sheep raiser in New Zealand. The evidence shows that he was quite successful in this business, and that it was in this way he accumulated the fortune which was disposed of by the will in question. Testator was never married. He had three brothers and a sister living in New Zealand, and the descendants of a deceased brother, who are his heirs at law and appellees herein. It was one of the contentions of appellees below, to support which much evidence was introduced, that the testator was afflicted with a form of insanity known as paranoia, the principal characteristic of which is that the sufferer possesses insane delusions. One of the alleged delusions of the testator was that he believed himself to be the object of constant and unrelenting persecutions by all women. He believed that all women were engaged in a conspiracy to destroy his life by poisoning because he had remained unmarried. Under the influence of this delusion the conduct of the testator as described by the witnesses is strangely absurd and irrational. It is not our purpose to rehearse the freakish manifestations of this mental malady. This condition had manifested itself in the conduct of the testator for a number of years prior to 1901, and his condition grew gradually worse. In 1901, apparently in the hope of ridding himself of his imaginary persecutors, he disposed of his sheep and sheep farm in New Zealand and on the twelfth day of August he set sail for England, being careful to select a ship without a stewardess or any other woman on board. At Cape Town, South Africa, he seems to have encountered some trouble owing to war ¹⁹³ regulations

and was left at Cape Town. While here he wrote a letter, which is as follows:

“CAPE TOWN, 29th Oct. '91.

“*Dear Nell*—I am stuck at Cape Town, owing to war regulations. They ordered me off the ship four minutes before she started and told me to be quick. I am so much persecuted with the women it is questionable if my constitution will stand it until I get through this bother and the journey by ships to England. If this murder by inches continues it will not be a long job now. What I write you more particularly for, is to let you know that I consider you as one of my murderers. There are, I should say, hundreds of them that have practiced this villainy upon me, that is cruelly and painfully killing me. If you want to go to hell you will get there unless you repent and get God's forgiveness, for if you did not drug me you had a guilty knowledge. You insult God by your villainy. By your actions you say he did not know how to make a man. Although you acted the drugging fiend to your own brother when he was at his wit's end to know where to turn to live, it is not my wish for you to go to hell but I hope you will forsake all sins and accept God's full salvation. My stomach is about poisoned to incapacity and kidneys affected. I don't expect ever to see you again. Your husband's stomach was all off duty I suppose. He has had his share of woman's villainy. May God forgive you. If you know how hard it is to be gradually poisoned by inches you would count death a happy release. Good bye. Get rid of all your sins at our loving Saviour's feet.

“Your poor, three-quarters murdered, brother,

“F. SUTTON.

“Tell the set of murdering knights that the job is about completed. I get weaker day by day and can scarcely eat anything.”

It is proved that the person addressed as “*Dear Nell*” was his only sister and that the letter was in the handwriting of the testator. The objection urged to this letter is, that it appears from the date of it that it was written in 1891, but it is clear that the abbreviation “'91” was a clerical error and was meant for 1901. This is shown by the fact that the testator was in Cape Town about October, 1901. There is no evidence that he was ever there at any other time, and by the further historical fact, of which the court will take judicial notice, that the Boer war was in progress during

the year 1901. If the date of the letter was, as contended ¹⁹⁴ by appellants, in 1891 instead of ten years later, we are not prepared to say that it would be for that reason inadmissible. Its remoteness from the time of the execution of the will might weaken its probative force, but it cannot be said that it would not be some evidence tending to prove the issue of insanity. But, as already observed, all of the surrounding circumstances show that there was a mistake in the date of the letter, and that it was, in fact, written only about a month before testator's arrival in Chicago and only a few months before the will in question was made.

It is further objected that the letter should have been rejected because there was no proof as to where it was written, or as to its ever having been sent to the party to whom it was addressed. This objection is not well founded. Whether it was sent to the person addressed, or where it was written, are matters that had no bearing upon the admissibility of the letter in evidence upon the issue of insanity. The issue being as to the state of testator's mind, what he did and said is original evidence bearing on that issue. It is the fact that the testator wrote the letter, and not the place where he wrote it, or the fact that it was sent to the person addressed or to any other person, that makes it competent evidence. There was no error in admitting this letter in evidence.

3. It is insisted by appellants that the court erred in giving to the jury appellee's instruction numbered 3. That instruction is as follows:

"You are instructed that in order for a will to be valid the person making the same must, at the time of the execution thereof, be of sound mind and memory sufficient to understand, appreciate and be equal, mentally, to the task undertaken. In order to be of such sound mind and memory the person making such will must, at the time he signs it, be capable of knowing what his property is, who are the natural objects of his bounty, and be able to understand the nature, consequence and effect of the act of executing his ¹⁹⁵ will. All of these elements must concur, and the absence of any one of them will render such person incompetent to make a valid will, although all the other elements may be present; and if you believe, from the evidence, that the said Frederick Sutton, at the time of the execution of the said alleged will and codicil, was not capable of knowing who were the natural objects of his bounty, then and in that case you will find against

the validity of the said alleged will and codicil; and if you believe, from the evidence, that the said Frederick Sutton, at the time of the execution of said alleged will and codicil, did not understand the nature or consequence of the execution of his will and codicil, then and in that case you must find against the validity of the alleged will and codicil. You are further instructed upon the subject of soundness of mind, that even where a testator is of sound mind at the time he signs or executes it, yet if he is so far under the dominion of a person in whose favor he makes the will as to prevent the free exercise of his judgment, such testator is not, in the contemplation of law, of disposing mind and memory. If you believe, from the evidence, that at the time of the execution of the alleged will in this cause Frederick Sutton was so far under the dominion of any person as to prevent the free exercise of his judgment, said Frederick Sutton was not, at the time aforesaid, in contemplation of law, of disposing mind and memory, and in that case your verdict must be against the validity of the will and in favor of contestants."

It is first objected that the above instruction presents a standard of mental capacity far above that which the law requires. This objection is based on the sentence, "all of these elements must concur, and the absence of any one of them will render such person incompetent to make a will." The objection is to the concurrence of the several elements previously stated in the instruction, and it is argued that this expression is equivalent to telling the jury that the testator ¹⁹⁶ must have mental capacity sufficient to hold all these things in his mind at the same time, and the case of *Calvert v. Carpenter*, 96 Ill. 63, is relied on in support of this objection, where an instruction which required the testator to be able "to hold all these things in mind at the same time" was condemned, and it is argued that the instruction under consideration is open to the same objection. The expression, "all of these elements must concur," does not mean the same as being able "to hold all these things in mind at the same time." The test of testamentary capacity laid down in the instruction—that the testator must be capable of knowing what his property is, who are the natural objects of his bounty, and also be able to understand the nature, consequence and effect of the act of executing a will—is not questioned by appellants. While it is not a proper direction to tell the jury that he must be able to hold all these things in his mind at the

same time, yet it is proper to tell the jury that the absence of any one of these requirements would indicate a want of testamentary capacity. The meaning of the instruction in question on this point is simply that the jury were required to believe that the testator possessed the mental power to comprehend and understand all these elements at the time he executed the will. Manifestly, if he was able to remember his property, but was incapable of knowing who the natural objects of his bounty were, he was not capable of making a will although he might be able to understand the nature, consequence and effect of the execution of a will; or if he was capable of knowing who were the natural objects of his bounty and the effect and consequence of making a will, but was incapable of knowing what his property was, one of the elements of capacity would be absent and the will would fail. The effect of the instruction is to inform the jury that there must be a concurrence of all the elements in order to have testamentary capacity, and while it might have been more skillfully worded we do not think it was misleading in this respect.

¹⁹⁷ It is next urged that the instruction is open to the objection that it undertakes to give a summary of facts and only recites such as are favorable to appellees. The instruction is not open to this criticism. There is no attempt to recite a summary of facts, but it tells the jury what the proper tests of mental capacity are, and that it is necessary that the proponents should prove them in order to sustain the will.

The third objection to the instruction is, that it does not qualify "dominion" by "wrongful," and a number of cases are cited where it has been held that it is not unlawful for a man, by honest advice or persuasion, to induce a testator to make a will or to influence the disposition of his property, and that such advice or influence will not vitiate a will when freely and voluntarily made from a sense of propriety, even though the will might never have been made but for such advice. Among the cases where this doctrine has been recognized by this court, the following may be cited: *Yoe v. McCord*, 74 Ill. 33; *Sturtevant v. Sturtevant*, 116 Ill. 340, 6 N. E. 428; *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369. The cases all agree that the influence which will vitiate a will must be a wrongful influence. The word "undue," when used to qualify influence, has the legal meaning of "wrongful." Hence "undue influence" means a wrongful influence. But in-

fluence secured through affection is not wrongful, and when a will is made in favor of a child at his solicitation and because of partiality influenced by affection for him it will not be undue influence: *Dickie v. Carter*, 42 Ill. 376; *Brownfield v. Brownfield*, 43 Ill. 147; *Meeker v. Meeker*, 75 Ill. 260; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622. But the real test in all cases of this character is, Did the influence deprive the testator of his free agency? 1 *Redfield on Wills*, 522; *Roe v. Taylor*, 45 Ill. 485. An influence exerted over another which deprives him of his free agency and makes the will speak the will of another and not that of the testator cannot be other than wrongful, however acquired. ¹⁹⁸ The influence of affection or partiality for a child, coupled with persuasion or solicitation, is not wrongful in the legal sense of the term, but would be if it went to the extent of depriving the testator of his free agency: *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369. "Undue influence" is equivalent to wrongful influence, since it is said to be undue when it goes to the extent of depriving one of his free agency. But due influence or dominion alone does not meet the requirements of the rule, since influence or dominion may be either due or undue—that is, either rightful or wrongful. The use of the word "dominion" in the instruction, alone, would not convey the rule of law to the jury unless it was limited to the kind of dominion that the law requires to vitiate a will. No objection is made to the use of the word "dominion" instead of "influence," but only to the omission of "wrongful" as a qualification of it. This objection, however, is met by the language that follows the use of the word, to the effect "if he [the testator] is so far under the dominion of a person in whose favor he makes the will as to prevent the free exercise of his judgment." We think the element of wrongfulness is imparted to the word "dominion" by the qualification that it must go to the extent of depriving the testator of the free exercise of his own judgment. The instruction would have been better if the word "agency" had been used instead of "judgment," but the rule is sometimes stated in the substance of the words employed by the court in this instruction. In *Hall v. Hall*, 37 L. R. (1 Philip & Mary), 481, Mr. Justice Wilde laid down the rule in the following language: "Importunity or threats such as the testator has not the courage to resist, moral command asserted and yielded

to for the sake of peace and quiet or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes are overborne, will constitute undue influence, though no ¹⁹⁹ force is either used or threatened. In a word, a testator may be led—not driven—and his will must be the offspring of his own volition and not that of another."

We are aware that in the discussion of an instruction by this court, in *Yoe v. McCord*, 74 Ill. 33, there are some expressions that do not seem to be in harmony with the views expressed here. In that case, the instruction told the jury that if said "Yoe exerted such dominion and influence over said McCord [the testator] in reference to the making and execution of the alleged will in question, to such an extent as to substitute for the will said McCord designed and desired to make, and would have made if he had been left in the exercise of mental free agency, a will according to the views of said Yoe, then such latter instrument would not be entitled to probate, and the jury should find accordingly." While it was said of this instruction that it was erroneous in not embracing the element of fraud or wrong in the dominion or influence mentioned in the instruction, still it was not intended to lay down the rule that a dominion or influence that completely deprives a testator of all volition and substitutes the will of a dominant person for that of the testator, is not both wrongful and fraudulent. Such has not been the rule in this state either before or since the decision in the *Yoe* case (74 Ill. 33), and we do not think that the construction sought to be put upon the language of the court by appellants is warranted when the whole context of the opinion is read in the light of the facts then before the court. But even if the language in that case will bear no other construction than that an influence may be so powerful as to completely obliterate the will of the testator and result in the substitution of the will of another for the will of the testator and still at the same time not be an undue or wrongful influence, then the case must be regarded as having been overruled by the numerous later cases wherein the law is stated in accordance with the uniform rule, both in this country and in England, that undue influence or dominion ²⁰⁰ is such influence as deprives the testator of his free agency or volition. The latest case on this subject, so far as we are advised, is *Waters v. Waters*, 222 Ill. 26, 113 Am. St. Rep. 359, 78 N. E. 1.

Instruction No. 14 is objected to. It is not contended that the instruction is incorrect as a statement of the law, but it is said there is no evidence to show that the insane delusions had any influence on the testamentary disposition made of his property by Frederick Sutton. This fact, the want of proof of which forms the basis of the criticism made on this instruction, is embraced in the facts necessarily found by the jury, and the affirmance of the judgment made by the appellate court would constitute a complete answer to this contention. The failure of appellants to present a motion for a peremptory instruction waives the question whether there was evidence tending to prove all the essential facts upon which an adverse judgment must rest. But aside from this there is ample evidence in the record to justify the giving of this instruction.

Instructions numbered 15, 17, 18 and 22 are objected to. These instructions are as follows:

“15. If you believe from the evidence that although Frederick Sutton had sufficient capacity to attend to the ordinary business affairs of life, yet that with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty he was insane, and while laboring under such insanity he signed the alleged will and codicil in question, and that in making and signing it he was so far influenced or controlled by such insanity as to be unable rationally to apprehend the nature and effect of the provisions of said alleged will and codicil, and was thereby led to make the alleged will and codicil as he did, then you must find the alleged will and codicil not to be the will and codicil of the said Frederick Sutton.”

“17. You are instructed, as a matter of law, that undue influence in procuring the execution of a will which will ²⁰¹ render a will so procured invalid, is any improper or wrongful constraint, machination or urgency of persuasion whereby the will of a person is overpowered, and that he is induced to do or forbear an act which he would not do, or would do, if left to act freely. And if you believe, from the evidence in this case, that such undue influence was exerted over Frederick Sutton by any person at the time he executed the alleged will and codicil involved in this suit, then and in that case it is your duty to find against the validity of such alleged will and codicil and return a verdict that the same is not the will and codicil of said Frederick Sutton.

“18. You are instructed that where a person of sound mind or memory is not subject to constraint or undue influence he may dispose of his property by will as he sees fit. But where undue influence or want of testamentary capacity is charged, as they are in this case, all of the surrounding facts, including the bequests themselves, their propriety or impropriety, their reasonableness or unreasonableness, in view of the situation, relations and circumstances of the testator, may be considered in determining whether the testator was, at the time of the execution of the alleged will and codicil, of sound mind and memory or whether the alleged will and codicil was procured by undue influence.”

“22. You are instructed that direct evidence of undue influence in procuring the execution of a will is not required to prove the existence of such undue influence. Proof of undue influence may be made by evidence of facts from which the inference of the existence of such undue influence may naturally and reasonably be drawn, and if you believe from the evidence that any fact or facts are proved from which the inference may fairly and reasonably be drawn that the alleged will and codicil of Frederick Sutton was procured by undue influence operating upon him at the time of the execution of the said alleged will and codicil, then and in that case it is your duty to find that said alleged will and codicil is not the will and codicil of Frank Sutton.”

²⁰² The objections to instruction 15 are, that it is not in harmony with instructions 4 and 5 given on behalf of appellees. There is no conflict in these instructions. Instruction 15 informs the jury that the testator might have had sufficient capacity to attend to the ordinary business affairs of life, and yet at the same time be without sufficient capacity to make a will, if he was insane with reference to the subjects connected with the testamentary disposition of his property and the natural objects of his bounty. This instruction was based on the appellees' theory of the case that Frederick Sutton was the victim of certain delusions that influenced him in the making of the will in question, and it was proper for the court to instruct the jury in accordance with the theory of both parties and leave the jury to determine the fact upon which the instructions were, respectively, predicated.

Instruction No. 17 is criticised for one of the reasons urged against instruction No. 3 and which has been disposed of, but it will be seen by an examination of the instruction

now under consideration that it is not open to the objection urged to No. 3. It is also said that this instruction should not have been given, because there was no evidence upon which to base it. This objection cannot be sustained.

The principal objection to instruction No. 18 is, that the instruction tells the jury that in determining the question of undue influence or want of testamentary capacity the jury might take into consideration all the surrounding circumstances, including the bequests themselves, their propriety or impropriety, their reasonableness or unreasonableness, in view of the situation, relations and circumstances of the testator, and the case of *Rutherford v. Morris*, 77 Ill. 397, is relied upon as authority. It is true that language may be found in *Rutherford v. Morris*, 77 Ill. 397, which might appear to sustain appellants' contention, but that case was decided by a divided court, and that part of the opinion which seems to support appellants' contention here does ²⁰³ not appear to have been concurred in by a majority of the court. Four of the justices filed a special concurrence agreeing to the result but not concurring in all that was said, while one of the justices dissented: *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57. The language relied upon by appellants is regarded now by this court as practically overruled by the case of *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57: See *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526. The principle of the instruction now under consideration has often been approved. It is the well-established rule of law in this state that a person of sound mind and memory and subject to no undue influence may dispose of his property by will in any manner that he sees fit. He may give it to his kindred or he may bestow it upon strangers, and the fact he makes one disposition rather than another of his estate does not have any tendency to impeach the validity of his will. If he is competent to make a will at all and is free from undue influence, the propriety or impropriety of his testamentary disposition is a matter with which the courts and juries have no concern. But while this is well settled, it is equally clear, under the decisions of this court, that where want of testamentary capacity, undue influence, or fraud is charged, then all of the surrounding facts, including the will itself, its propriety or impropriety, its reasonableness or unreasonableness, in view of the situation, relations and circumstances of the testator, may be considered as bearing upon the issues thus raised: *McCommon v. McCom-*

mon, 151 Ill. 428, 38 N. E. 145; *Graham v. Deuterman*, 206 Ill. 378, 69 N. E. 237; *Piper v. Andricks*, 209 Ill. 564, 71 N. E. 18; *French v. French*, 215 Ill. 470, 74 N. E. 403.

The objection to instruction No. 22 is too refined to be readily apprehended. It is said: "If the instruction had used the word 'positive' instead of 'direct,' it might, by straining a point, have been held good. All evidence of any value must be direct evidence to be admissible at all." We fail to see any force in this objection. It is true that some writers on the law of evidence use the word "positive" ²⁰⁴ in the sense of affirmative as contradistinguished from negative facts (1 *Best on Evidence*, sec. 13); but, so far as we are advised, all the books treat direct evidence and indirect or circumstantial evidence as a rational and elementary classification which is too well understood to require discussion: See 1 *Best on Evidence*, sec. 27; 1 *Elliott on Evidence*, sec. 14; *Starkie on Evidence*, 19.

4. Some argument is presented on the point that since the bequest was clearly for the benefit of the Christian Catholic Church as the beneficiary, the church should have been made a party defendant to the bill. The bequest was to John Alex. Dowie and his successors, as overseers of the Christian Catholic Church. No trust is expressed and full power to dispose of the estate in furtherance of the object of the request is given to Dowie and his successors. Had the church been made a party it would have been impossible to serve it except by serving Dowie, as the head official and representative. It is not possible to serve the entire membership, which is stated to be two hundred and fifty thousand, scattered all over the world. We fail to see any force in this suggestion. Besides, if the church was a proper party it would only be a formal and not a necessary party (*American Bible Soc. v. Price*, 115 Ill. 623. 5 N. E. 126), and this being true, the objection should have been taken in the court below. It cannot be raised for the first time in the appellate court.

5. Error is assigned on the decree awarding costs against the executor. The estate of Frederick Sutton cannot be drawn on to reimburse the appellants for their expenditures in the unsuccessful effort to uphold the will. The executor must look to the beneficiaries, in whose behalf he has carried on the litigation, for his costs. The appellate court properly disposed of this question under the authorities cited.

Finding no error in this record, the decree below and the judgment of the appellate court for the first district are affirmed.

Testamentary Capacity exists if the testator understands the nature of the business in which he is engaged when he executes his will, knows the persons who are the natural objects of his bounty, and realizes what property he has and what disposition he wishes to make of it: *Waters v. Waters*, 222 Ill. 26, 113 Am. St. Rep. 359, and cases cited in the cross-reference note thereto.

Insane Delusions as Affecting Testamentary Capacity are discussed in the note to *People v. Hubert*, 63 Am. St. Rep. 80. Although a person entertains insane delusions, his will is valid, unless it is in some way connected with such delusions: *Estate of Hemmingway*, 195 Pa. 291, 78 Am. St. Rep. 815; *Buchanan v. Pierre*, 205 Pa. 123, 97 Am. St. Rep. 725.

Undue Influence as Affecting the Validity of a Will is the subject of a note to *In re Hess' Will*, 31 Am. St. Rep. 670. Such influence, in order to invalidate a will, must amount to such a degree of restraint or coercion as destroys the free agency of the testator at the time of the performance of the testamentary act: *Waters v. Waters*, 222 Ill. 26, 113 Am. St. Rep. 359, and cases cited in the cross-reference note thereto.

ILLINOIS CENTRAL RAILROAD COMPANY v. FITZPATRICK.

[227 Ill. 478, 81 N. E. 529.]

MASTER AND SERVANT.—The Doctrine of Assumed Risk applies as well to those risks which arise or become known to the servant during the service as to those in contemplation at the time of the original hiring. (p. 282.)

MASTER AND SERVANT.—The Rule of Assumption of Obvious Risks does not rest wholly upon the contract of hiring, express or implied, but rather upon a waiver evidenced by the servant continuing in the employment with full knowledge of the danger. (pp. 282, 283.)

MASTER AND SERVANT—Assumption of Risk—Gross Negligence of Master.—Where a servant has knowledge of a danger in connection with the place of work or appliances in use, and voluntarily continues in the service without complaint and without any promise from the master to remedy the defect, he assumes the risk from such known defects and waives all claims to damages resulting therefrom; and it is immaterial that the defect exists as a result of gross negligence on the part of the master. (p. 283.)

Action by Esther Fitzpatrick, administratrix of the estate of James Fitzpatrick, against the Illinois Central Railroad

Company, for wrongfully causing his death. Fitzpatrick was employed by the railroad company as switchman, and had been so employed for about two weeks. On the day of his death, he went inside a foundry yard with the crew with which he was working to take out some cars standing on the switch track which ran from the main track into such yard. Inside the yard the switch track was inclosed by an embankment of earth, the perpendicular face of which was held in place by boards nailed to posts. At one point (the place where Fitzpatrick was killed), the pressure of the earth had caused one of the posts to lean toward the railroad track, until the distance between it and the body of the car standing on the track was from six to nine inches. While engaged in coupling cars near the post, Fitzpatrick was caught between the post and a car with a projection thereon, which came within a few inches of the post, and received injuries which resulted in his death. The plaintiff recovered a judgment for damages, which was affirmed in the appellate court. The railroad company then prosecuted a further appeal to this court, because the trial court refused to direct a verdict for the appellant, and because that court gave erroneous instructions to the jury.

Calhoun, Lyford & Sheean and John G. Drennan, for the appellant.

Hummer, Murphy & McDonald, for the appellee.

⁴⁸¹ VICKERS, J. Without entering into any discussion of the evidence, it is manifest from the foregoing statement that the court did not err in refusing to direct a verdict for appellant.

At the instance of appellee the court gave the jury the following instruction: "The court instructs the jury, as a matter of law, that the risks assumed by the servant of the master are the ordinary and usual risks incident to his employment, and that 'ordinary' and 'usual' risks of his employment include only such ⁴⁸² risks as cannot be obviated by the master's employment of a reasonable measure of precaution; and you are further instructed that risks that are unreasonable or extraordinary, or that arise from the master's negligence, are not assumed by the servant."

This instruction lays down the rule that dangers arising from the master's negligence are not assumed by the servant. It is the well-settled law in this state that when a servant engages

in any employment he does so in view of the usual and ordinary risks incident to it, and he will be presumed to have contracted with reference to such risks, and for an injury received from such incidental and ordinary risks connected with his employment he cannot recover: 2 Cooley on Torts, 3d ed., p. 1042; 20 Am. & Eng. Ency. of Law, 2d ed., 109; Chicago etc. R. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74. This doctrine of assumed risks applies as well to those risks which arise or become known to the servant during the service as to those in contemplation at the time of the original hiring: 2 Cooley on Torts, 3d ed., 1044. "However gross the fault of the master in subjecting the servant to the risk of injury from defective buildings, premises or appliances, yet where the servant knows the defects and dangers, and still, knowingly and without protest consents to incur the risk to which he is exposed, thereby he is deemed to assume such risk and to waive any claim for damages against his master in case of injury": 2 Cooley on Torts, 3d ed., 1046. In such case the assumption of the risk does not rest wholly upon the contract of hiring, express or implied, but rather upon a waiver which is evidenced by the servant continuing in the employment with a full knowledge of the danger. In O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, the supreme judicial court of Massachusetts uses this language: "The doctrine of the assumption of risks of his employment by an employé has usually been considered from the point of view of a contract, express or implied, ⁴⁸³ but as applied to actions of tort for negligence against an employer it leads up to the broader principle expressed by the maxim, 'Volenti non fit injuria.' One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger." In Drake v. Auburn City Ry. Co., 173 N. Y. 466, 66 N. E. 121, which is a case in many respects like the case at bar, it is said: "The rule of assumption of obvious risks does not rest wholly upon the implied agreement of the employé, but is an independent

act of waiver, evidenced by his continuing in the employment with a full knowledge of all these facts.”

Where the servant has knowledge of a danger in connection with the place where he is required to labor or in connection with the appliances with which he is to do his work, and with such knowledge he voluntarily elects to continue in the service without complaint and without any promises of the master to remedy the defect, he must be held to assume the risks from such known defects, and waives all claim, by thus continuing in the employment, to damages resulting to him from such defect. In such a case it is wholly immaterial that the defect exists as a result of gross negligence on the part of the master. The instruction under consideration, which told the jury that the servant did not assume the risks arising from the master's negligence is not an accurate statement of the law as applied to the facts in this case. In *Drake v. Auburn City Ry. Co.*, 173 N. Y. 466, 66 N. E. 121, a street-car conductor was killed while riding on the running-board of his car, in the discharge of his duty, by being struck on the head by a leaning tree which stood in close proximity to the railroad ⁴⁸⁴ track. The evidence showed in that case that the conductor had passed this tree about one hundred and sixty times as conductor, and fifty trips as motorman, and it was held, under the above facts, that it was error to submit the question of assumption of risk to the jury, and that it should be determined, as matter of law, that the deceased assumed the risk. The case at bar differs very materially from the *Drake* case as to the opportunities the deceased had for observing and becoming familiar with the dangerous situation, and it therefore cannot be determined in this case, as a matter of law, that the deceased assumed the risk in attempting to make this coupling under the circumstances disclosed by the evidence. It was therefore a question of fact to be determined by the jury, and appellant was entitled to have the question determined under proper instructions. Under the instruction being considered, the jury might believe that the deceased assumed the risk, but if they further believe that the danger grew out of the negligence of appellant in operating its cars in dangerous proximity to the leaning post, they would have to conclude that such assumption of risk by the deceased was no bar to recovery. The error in giving this instruction is not cured, if, indeed, it could be, by any other instruction in the series.

Appellant also insists that the court erred in giving instructions numbered 3, 4, 5, 7, and 9. We have carefully considered the several objections of appellant to these instructions and have reached the conclusion that none of them are open to the objections urged against them. But for the error in giving instruction No. 2 the judgment must be reversed and the cause remanded.

The Doctrine of Assumption of Risks is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289. The general rule is, that servants assume such risks as are naturally and reasonably incident to the service so far as the hazards are obvious and within their apprehension: *Shaver v. Home Tel. Co.*, 36 Ind. App. 233, 114 Am. St. Rep. 373. And it has been held that one seeking and obtaining employment as a brakeman assumes the risk of injury from structures unusually near the track, the danger from which is obvious: *McLeod v. New York etc. R. R. Co.*, 191 Mass. 389, 114 Am. St. Rep. 628.

AURORA v. ELGIN, AURORA AND SOUTHERN TRACTION COMPANY.

[227 Ill. 485, 81 N. E. 544.]

STREET RAILWAY.—The Fundamental Purpose of a street railway is to accommodate street travel, and not travel to or from points beyond the limits of the city. (p. 286.)

STREET RAILWAY—Construction of Franchise.—An ordinance granting the privilege to a street railway company to lay its tracks and operate its cars in the city is strictly construed in favor of the public and against the licensee. Nothing passes by mere implication against the public, and that which is not unequivocally granted is withheld. (pp. 287, 288.)

STREET RAILWAY—Contract to Transport Cars of Interurban Company.—A street railway company, having authority to operate cars and transport passengers in the streets of the city only, cannot confer its privileges upon an interurban railroad which has no authority to enter the city, by contracting with the interurban corporation to transport its cars with their passengers, express and freight through the city streets. (p. 289.)

INTERURBAN RAILROAD—Right to Enter City.—Where a corporation chartered to operate an interurban railroad desires to enter a city and propel cars along its streets for the transportation of freight or passengers, it must obtain a license to do so from the city, subject to such reasonable rules and regulations as the municipality may find necessary or proper to establish. (p. 290.)

The Elgin, Aurora and Southern Traction Company (hereinafter referred to as the Aurora company) was a railway corporation organized to operate street railways and also interurban railroads. It operated one line on Fifth street in the city of Aurora, but its authority to operate such line was as a street railway only. The Joliet, Plainfield and Aurora Railroad Company (hereinafter referred to as the Joliet company) was engaged in operating an interurban electric railway for the transportation of passengers, mail, express, and other matter from the city of Joliet to the eastern city limits of Aurora at the point where the Fifth street line of the Aurora company reached such eastern limits of the city. The Joliet company was without authority to enter the city of Aurora.

Both companies desired to effect a traffic arrangement which would obviate the necessity of a transfer of passengers from one line to another. Accordingly, they entered into a contract whereby the Aurora company leased the cars of the Joliet company wherein to convey passengers coming in on interurban cars to points along the Fifth street car line and to convey passengers from points along the Fifth street line to the point of connection of the lines of the two companies at the city limits. This arrangement also contemplated the transportation within the city limits of express, mail, and other matter in the leased cars.

The city authorities sought to prevent the passage of the cars of the Joliet company along its streets in accordance with the foregoing contract, whereupon the railway companies secured an injunction against such interference. The appellate court affirmed the decree of the district court so far as it enjoined the city and its authorities from interfering with cars conveying passengers only, but reversed the decree so far as it restrained the city from interfering with cars transferring freight, baggage, mail, and express. The city then appealed to this court.

E. M. Mangan, city attorney, and Murphy, Alschuler & Clyne, for the appellants.

Hopkins, Peffers & Hopkins, for the appellees.

496 SCOTT, C. J. The pleadings, with the exceptions to the answer sustained, and the proofs of the parties, properly present the questions which we regard as material in this controversy.

The authority possessed by the Aurora company under its charter and under the ordinances of the city of Aurora, as to the Fifth street line operated by that company, is authority to operate the same as a street railway only. By those ordinances street railway transportation alone is contemplated.

The chief characteristic of a street railway is, that it is built upon and passes along streets and avenues for the convenience of those moving from place to place thereon. Its fundamental purpose is to accommodate street travel, and not travel to or from points beyond the city's lines: *Harvey v. Aurora etc. Ry. Co.*, 174 Ill. 295, 51 N. E. 163; *In re South Beach R. R. Co.*, 119 N. Y. 141, 23 N. E. 468; *Diebold v. Kentucky Traction Co.*, 117 Ky. 146, 111 Am. St. Rep. 230, 77 S. W. 674, 63 L. R. A. 626; *Zehren v. Milwaukee Electric etc. Co.*, 99 Wis. 83, 67 Am. St. Rep. 844, 74 N. W. 538, 41 L. R. A. 575; *Rahn Township v. Street Ry. Co.*, 167 Pa. 84, 31 Atl. 472. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, and street railways embrace all such as are constructed and operated in the public streets for the purpose of carrying passengers with the ordinary luggage from one point to another on the street: 1 Lewis on Eminent Domain, sec. 110a.

The Joliet company is not a railroad organized for the purpose of operating a street railway in a city or town, but its function is that of an ordinary commercial railroad. The Aurora Street Railway Company by its charter had power to construct and operate a street railway. The only authority from the city it could claim to operate street-cars on its Fifth street line in Aurora was by virtue of the licenses transferred to it in the manner set forth in the foregoing statement of facts.

⁴⁹⁷ The Joliet company was chartered under the general railway act, and is engaged in operating an interurban railroad between Joliet and Aurora, and it does not have authority to enter the streets of the city of Aurora without the consent of the city. It could not of its own power propel any of its cars on any of the streets of the city of Aurora without the assent of the city council of that city. The right to occupy the streets of a city with a railroad track and propel cars thereon can only be obtained by consent of the city council, and the council may prescribe the conditions

and limitations under which license to occupy its streets may be granted. The city may require the payment of compensation for the license: *Byrne v. Chicago General Ry. Co.*, 169 Ill. 75, 48 N. E. 703; *Wells v. Northern Trust Co.*, 195 Ill. 288, 63 N. E. 136; 22 Am. & Eng. Ency. of Law, 2d ed., 22. Such licenses are a legitimate source of city revenue.

The effect of the agreement between the Aurora company and the Joliet company, if it is enforceable, is to confer on the Joliet company authority to extend the line of its road into the streets of the city, and to propel its cars, manned by its employes who are paid out of its treasury, along the streets from the city limits to the transfer station of the Aurora company, which by the contract becomes, in effect, the depot of the Joliet company. The provision of the agreement that the employes of the Joliet company were to be deemed employes of the Aurora company while in the streets of the city, though to be paid by the Joliet company, had no magical effect to convert the interurban coaches into street-cars, or the passengers who were making trips from other points to Aurora, or vice versa, into passengers of a street-car line proceeding from point to point within the city. The authority of the city of Aurora over its streets is not abrogated or at all diminished by the provisions of the contract.

The appellate court declared the contract did not confer lawful authority on the Joliet company to transport freight, express, baggage and mail on its cars along the street-car ~~498~~ tracks of the city. This holding was right, because the license and charter of the Aurora company are not broad enough to authorize the Aurora company to confer power on the Joliet company to transport baggage, freight, express and mail through the streets of Aurora. We think the same reasoning ought to be given application with respect to the authority granted to the Aurora company by charter and ordinances to operate its street-cars and carry passengers on the Fifth street line. That authority is not broad enough to empower the Aurora company to confer upon the Joliet company the right to transport its passenger cars and passengers over the line in question.

An ordinance granting the privilege to a street railway company to lay its tracks and operate its cars in the city is always to be strictly construed in favor of the public and against the licensee. Nothing passes by mere implication against the public, and that which is not unequivocally

granted is withheld: *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. Rep. 689, 36 L. ed. 587; *Packer v. Sunbury etc. R. R. Co.*, 19 Pa. 211; *People v. Newton*, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174.

The license to the Aurora company cannot be assigned by it so as to invest the Joliet company with power to operate the passenger traffic of a commercial railroad or interurban railroad through the streets of the city of Aurora. The Aurora company did not, by virtue of these ordinances, obtain the right to authorize a railroad company organized to transport passengers between points outside of the city to enter the city of Aurora and transact its business in and along the streets of said city of Aurora over the lines of the street railway. The city of Aurora possesses the power and authority to determine whether interurban railroads chartered and authorized to convey passengers to the city limits shall bring their cars and passengers within the city streets and transport them on, in and along the streets to a depot in the city.

⁴⁹⁹ It is earnestly insisted by appellees that the contract in question is authorized by sections 44 and 45 of chapter 114 of Hurd's Revised Statutes of 1905, which provide:

"Sec. 44. All railroad companies incorporated or organized under, or which may be incorporated or organized under the authority of the laws of this state, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof; and also to contract for and hold in fee simple or otherwise, lands or buildings in this or other states for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act.

"Sec. 45. All railroad companies incorporated or organized, or which may be incorporated or organized as aforesaid, shall have the right of connecting with each other, and with the railroads of other states, on such terms as shall be mutually agreed upon by the companies interested in such connection."

In *City of Chicago v. Evans*, 24 Ill. 52, it was held that two horse railways might, under the quoted sections, unite their roads and make running arrangements with each other, but the fact is there pointed out that the two roads were

“created for the same purpose.” It also appears that both were operating in the same city, and that each had permission from the municipal authorities to operate a street railway in the streets of the city. Appellee roads were not created for the same purpose, were not operating in the same city, and but one of them had permission from the city of Aurora to engage in operating a street railway in the streets of that city. We do not think the case just referred to determines the question of their right to enter into this contract. A street railway is not an additional burden upon the street of a city, while a commercial railroad is a further burden upon such way: *Wilder v. Aurora* ⁵⁰⁰ etc. Traction Co., 216 Ill. 493, 75 N. E. 194. It follows that a street railway company may not lawfully carry the cars of a commercial railroad for the purpose of transporting therein the passengers of the latter over the lines of the street railway without the permission of the city authorities of the city in which the lines in question are located. If it were otherwise, the power to determine when, where and in what manner interurban lines should enter a city and traverse its thoroughfares with passenger traffic would be lodged, in great part, not in the city authorities, but in the street railway company in every city where a street railway company is rightfully operated.

It is said, however, that the sections of the statute just quoted entered into and became a part of the ordinances passed by the city of Aurora under which the Aurora company now operates its street railway, and consequently, by such ordinances, the city authorized the Aurora company, as the successor of those to whom the ordinances originally ran, to grant unto the Joliet company the right to propel its passenger-cars, or have them propelled, over the lines of the street railway. We think this position untenable. Not infrequently private individuals own the fee in the streets. In such instances the owners are not in any way damnified by the construction of a street railway in the streets, but operating a commercial railroad in the streets is an additional servitude upon the fee. Now, following the reasoning of the appellees, if the ordinance and the statute enable the street railway company to authorize the commercial railroad company to use the lines of the street railway over which to operate its cars without the permission of the city, it would seem that the ordinance and statute so enable the street railway company to confer such right without any reference to

the objections of private individuals who may own the fee of the streets, and it would seem, in that event, that such individuals would be without recourse. The law is not so. Where a corporation chartered to operate an interurban railroad ⁵⁰¹ desires to enter a city of this state and propel cars in and along the streets of the city for the purpose of transporting its passengers or freight into the city, it must seek and obtain a license to do so from the city, subject to such reasonable rules and regulations as the municipality may find it necessary or proper to establish.

It is unnecessary to consider other points made by appellants.

The judgment of the appellate court and the decree of the circuit court are each reversed, and the cause will be remanded to the circuit court, with directions to enter a decree dissolving the injunction and dismissing the bill for want of equity.

Farmer and Vickers, JJ., took no part in the decision of this case.

An Electric Railroad Company authorized to carry freight and passengers between different states and all intermediate points is a "trunk railway" within the meaning of a constitutional provision that municipalities shall not grant franchises to street railways and other enumerated corporations, except to the highest and best bidder, but that such provisions "shall not apply to a trunk railway": *Diebold v. Kentucky Traction Co.*, 117 Ky. 146, 111 Am. St. Rep. 230. The distinctive and essential character of a street railway is, that it is a railway for the transportation of passengers and not of freight: *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 52 Am. St. Rep. 608.

A Charter Granted by a City to a Street Railway company is construed strictly against the company. It has no doubtful rights under the charter, for any doubts thereunder are construed against the grantee and in favor of the city: *Western Paving etc. Co. v. Citizens' etc. Ry. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462.

CASSTEVENS v. CASSTEVENS.

[227 Ill. 547, 81 N. E. 709.]

CLOUD ON TITLE.—One having an Equitable Fee may maintain a bill to set aside a cloud on title. (p. 292.)

CLOUD ON TITLE.—The Decree in a Suit to quiet title should not require the defendant to convey the land to the complainant. (p. 292.)

EQUITY PRACTICE.—Although the Specific Relief prayed for in a bill is denied, yet under the general prayer such relief should be granted as the complainant may be found entitled to under the allegations and proof. (p. 293.)

PARTITION BY AGREEMENT—Decision of Arbitrators.—Where the widow and heirs of a decedent agree in writing to leave the division of his estate to three persons whom they select, the decision of these three is binding upon the parties who sign the agreement, as a common-law submission to arbitration. (p. 293.)

PARTITION BY AGREEMENT—Construction of Deeds—Evidence of Consideration.—When partition is made by mutual deeds, they should be read and construed in the light of the circumstances attending their execution, and it is competent to show that the only purpose of the parties was to accomplish partition, and that no other consideration passed between them. (p. 295.)

SPECIFIC PERFORMANCE of the Conveyance of Land will not be decreed unless the contract is established by competent evidence, free from doubt or suspicion, clear and definite in terms, and upon a valuable consideration. (p. 295.)

PARTITION BY AGREEMENT—Insufficiency of Consideration.—The mutual agreement of cotenants to divide the common property is a sufficient consideration to support the division, if each takes the proportion to which he is entitled under the law; but it is not a sufficient consideration for a division of the estate of a deceased person between his widow and heirs which gives her a fee simple title to one-third of the land instead of a life estate in such third. (p. 296.)

Lewis Casstevens died, leaving, among other properties, about three hundred acres of farm land. Subsequently his widow and two sons executed the following agreement:

“We, the heirs of Lewis Casstevens, deceased, hereby agree to leave the division of the estate to (3) three disinterested persons to be selected by ourselves, and to peacefully abide their decision. The above selection must be made on or before Jan. 9, 1897.

“AMANDA CASSTEVENS,
“A. T. CASSTEVENS,
“WALTER CASSTEVENS.”

The three persons selected decided that each son should have one hundred acres in fee, and they also allotted to the widow one hundred acres which at one time had been the homestead. Each took possession of the premises so allotted. The widow resided in town at the time of the division and did not then, nor does she now, claim any interest of homestead in the farm property. The wife of A. T. Casstevens did not sign the agreement. The main question here involved is whether the widow is entitled to her one hundred acres in fee or for life only.

The widow filed a bill to remove the cloud on her title, alleging that A. T. Casstevens had no interest in the land assigned to her, but that there was nothing of record to show that he did not still have an interest therein as an heir of Lewis Casstevens. The bill prayed that this cloud should be removed, and that A. T. Casstevens and wife should be required to execute a deed to the complainant, and in default thereof that the master in chancery should make such a deed. The court found the allegations of the bill true, and entered a decree in accordance with the prayer. An appeal was taken to this court by A. T. Casstevens.

Edward C. & James W. Craig, Jr., Brewer & Brewer and Lyle Decius, for the appellant.

John S. Hall, for the appellee.

550 CARTER, J. Counsel for appellant insist that as appellee Amanda Casstevens has no legal title in fee to the lands in question she could not maintain her suit to quiet title, particularly as against a person having the record title. "A bill to set aside a cloud on title is a proceeding in equity, and one who holds an equitable fee will be treated as the owner, and such equitable title will support the allegation of ownership of the title": *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643; 2 Pomeroy's *Equitable Remedies*, sec. 730. If this proceeding be a bill to quiet title, then the decree should not have required, as it does, the conveyance by A. T. Casstevens and his wife of the land by deed to the complainant: *Rucker v. Dooley*, 49 Ill. 377, 99 Am. Dec. 614; *Pratt v. Kendig*, 128 Ill. 293, 21 N. E. 495; *Clay v. Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352. This bill is more in the nature of a bill for specific performance than to remove a cloud on the title, but in addition to praying for

specific relief it also contains a prayer for general relief. The rule is, in such cases, that although the specific relief prayed for in the bill may be denied by the decree, yet under the general prayer such relief should be granted as may be found, under the allegations of the bill and the proof in support thereof, the complainant is entitled to: *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120; *Shields v. Bush*, 189 Ill. 534, 82 Am. St. Rep. 474, 59 N. E. 962. Hence whether this be held to be a bill to quiet title or for specific performance, if the proof justifies it the court, under the allegations in the bill and the general ⁵⁵¹ prayer for relief, should grant such relief as in equity the parties are entitled to.

The main point to be decided from the record is, What was the extent of the interest which the three persons chosen to divide the property decided should be given to the widow? Was it a fee or merely a life interest? There is nothing in the record to establish any agreement between the parties subsequent to the finding of these three arbitrators or commissioners directing the partition of the premises. The decision of these three men, duly appointed, if not accompanied by such fraud or mistake as would render it voidable, would be binding upon the parties who signed the agreement, as a common-law submission to arbitration: *Eisenmeyer v. Sauter*, 77 Ill. 515; *Phelps v. Dolan*, 75 Ill. 90; *Smith v. Douglass*, 16 Ill. 34; 2 Am. & Eng. Ency. of Law, 2d ed., 540. The evidence as to what these arbitrators or commissioners actually decided in dividing the property is not clear. Two of the three are dead, and the surviving one, Newton Bassett, had moved out of the state and was not located until about the time of the trial. Appellant then made an affidavit for continuance to take the deposition of Bassett, and in the affidavit stated that the witness was residing in Oklahoma, and that he expected to prove, among other things, by Bassett, that he was one of the persons chosen to divide the premises, and that he and the other two commissioners, in pursuance of said article of agreement, went upon said land and assigned to said Amanda Casstevens, as and for her dower and homestead interest in said land, the land described in the bill of complaint; that she was not to be the owner of said land set off to her as a fee-simple estate. On this affidavit being presented the court held that it set up sufficient grounds for continuance, and thereupon counsel for the appellee, Amanda Casstevens, admitted that if the said Bassett were present

he would testify as set forth in the affidavit. Such admission having been made, the trial proceeded.

⁵⁵² It appears from the evidence that three deeds were made out by a notary public, one M. A. Ewing, who was one of the witnesses called by appellee, Amanda Casstevens. He stated that these deeds were made out at the request of the two sons and were taken to the house of the widow, and the two conveying the parts allotted to the sons were signed; that Walter Casstevens signed the deed to his mother's portion but did not acknowledge it, and that A. T. Casstevens refused to sign it. A document was introduced in evidence which he stated was the deed in question, it being statutory quitclaim in form, conveying from the two sons and the wife of A. T. Casstevens to the widow the one hundred acres in question, no mention being made of a life estate. It does not clearly appear from Mr. Ewing's testimony as to how much evidence this deed affords of the finding of the arbitrators or commissioners. He stated that he drew the deeds when the three arbitrators were present and that they compared the descriptions to see if they were right. However, later in his testimony, we find the following questions and answers:

"Q. You did not understand she had any fee simple in the matter? A. I did not consider it was any of my business.

"Q. Did you understand that she had any fee simple? A. By the agreement I inferred she did.

"Q. You inferred she had a right to deed that away? A. Yes."

This would indicate a conclusion based on his own judgment as to the meaning and intent of the agreement, rather than a definite knowledge as to the findings of the arbitrators.

The widow, Amanda Casstevens, testified that she understood she was entitled, under the agreement, to one hundred acres in fee, but her testimony does not make it clear whether she was giving her recollection of what the arbitrators found her share to be or her general idea of what ⁵⁵³ she thought it should be. The same may be said as to Walter Casstevens' testimony. Appellant, A. T. Casstevens, testified on this point that he thought there were plats or a written report made by the commissioners, and that he never heard anything from the commissioners with reference to the land allotted to his mother otherwise than that she was to have a dower interest. The testimony tended to show that these commissioners or arbitrators made a written report of their findings, which

was afterward lost and could not be produced in evidence. With the exception of what it was admitted Mr. Bassett would testify to if present, no positive testimony was given by any of the witnesses as to the contents of their report or the substance of their findings. M. A. Ewing, Walter Casstevens and the mother all testified that they did not understand there was any talk about dower or homestead.

When partition is made by mutual deeds between the cotenants, the deeds should be read and construed in the light of the circumstances attending their execution, in order to carry into effect the true intent of the parties; and it is competent to show that their only purpose was to accomplish the partition, and that no other consideration passed between the parties: 21 Am. & Eng. Ency. of Law, 2d ed., 1136. When a voluntary partition takes place, each party transfers or releases the interest which he had in all the land for an exclusive and fixed possession in a part, and he does not derive title or interest from his cotenant by this transfer so that either can be said to hold under the other: *Berry v. Seawell*, 65 Fed. 742, 13 C. C. A. 101. It is well established, as a general rule, that cotenants may partition the property among themselves by mutual agreement (21 Am. & Eng. Ency. of Law, 2d ed., 1131), and that the agreement in writing for partition will have the same effect as an actual partition: *Lavelle v. Strobel*, 89 Ill. 370.

⁵⁵⁴ So far as these proceedings partake of the nature of specific performance, the rules of equity invoked in such proceedings must be followed. Specific performance of the conveyance of land will not be decreed unless the contract is established by competent evidence, free from doubt or suspicion, clear and definite in terms and upon a valuable consideration: *Wolfe v. Bradberry*, 140 Ill. 578, 30 N. E. 665. Specific performance will not be decreed unless it is reasonable and equitable: *Hatch v. Kizer*, 140 Ill. 583, 33 Am. St. Rep. 258, 30 N. E. 605; *Montgomery Palace Stock Car Co. v. Stable Car Line*, 142 Ill. 315, 31 N. E. 434. The enforcement of a contract for specific performance is within the sound discretion of the court, according to the circumstances of each case: *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. 792. Equity will never enforce an executory agreement unless there was an actual valuable consideration: 3 Pomeroy's Equity Jurisprudence, sec. 1293. For the mere division of the undivided interests into several interests according to the proportions

taken by each party under the law, the mutual agreement to divide was a sufficient consideration, but there was no sufficient consideration to support a division which would give the widow a fee simple title to one hundred acres instead of a life interest in one-third of three hundred acres.

It must be admitted that the meaning of the written contract in question is somewhat ambiguous. The oral testimony as to its meaning is conflicting. India Casstevens, the wife of A. T. Casstevens, could not be compelled to join in a conveyance when she was not a party to the agreement: 2 Pomeroy's Equitable Remedies, sec. 834; Humphrey v. Clement, 44 Ill. 299; Mix v. Baldwin, 156 Ill. 313, 40 N. E. 959. But as she has not prayed an appeal this question is not vital: National Bank of Pontiac v. King, 110 Ill. 254.

The evidence is uncontradicted that the agreement to submit the division of the land was made solely for the purpose of saving the expenses of court proceeding. Had the partition been made in court, Amanda Casstevens would not have obtained, under the law, a fee in the one hundred acres ⁵⁵⁵ of land. She was not entitled to homestead, and, so far as this record discloses, a life interest in this one hundred acres of land fully equals, if it does not exceed, her dower interest in the entire three hundred acres. Plainly, from the testimony, the parties may not have had, at the time of the division, a clear understanding of what their interests were. The quitclaim deed to the mother, signed by Walter Casstevens and never acknowledged, was left lying carelessly about for years without anything being done concerning it until these proceedings were started. The record does not disclose why at this late date such proceedings were instituted. We are not prepared to hold that she is precluded from obtaining the relief asked for, on the ground of laches; but this delay, if it indicates anything, tends to show that she did not have the clear understanding as to her rights in the premises that she now claims.

From the evidence in the record we are of the opinion that Amanda Casstevens did not show such title in herself as would warrant a decree clearing from the record the interest of A. T. Casstevens as a cloud upon her title, or a decree compelling A. T. Casstevens and his wife to convey to her their interest in said one hundred acres. The burden of proof having been on the complainant to establish her title, either legal or equitable, and she having failed to do so by such satisfactory or tangible

proof as would justify either the special or general relief prayed for in the bill, we are of the opinion the trial court erred in not dismissing the bill for want of equity. The decree of the circuit court will be reversed and the cause remanded, with directions to dismiss the bill for want of equity.

When Partition of Land is Effected by Mutual Deeds between the cotenants, such deeds must be taken and construed together as one instrument, in the light of all the circumstances to which they obviously and directly point: See the note to Tomlin v. Hilyard, 92 Am. Dec. 124. It has been held that a deed entered into by several cotenants for the purpose of effecting a partition of the common property is void as to all of them if one of their number refuses and fails to execute it: Center v. Davis, 113 Cal. 307, 54 Am. St. Rep. 352.

A Suit to Remove a Cloud on Title may be maintained by the holder of a perfect equitable title, though out of possession: See the note to Helden v. Hellen, 45 Am. St. Rep. 376; Coleman v. Jaggars, 12 Idaho, 125, ante, p. 207.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

RATCLIFF v. WICHITA UNION STOCKYARDS COMPANY.

[74 Kan. 1, 86 Pac. 150.]

CONSTITUTIONAL LAW—Stockyards—Business Affected with Public Interest.—A stockyard business, located in a large city, at the junction of many railroad lines, furnishing the only proper facilities for the unloading, resting and feeding of livestock in transit, and for the sale of cattle within such city, is affected with public use and interest, which the state, in the exercise of its police power, may subject to regulation and control, and prescribe a reasonable maximum rate of compensation for the care and handling of stock thereat. (p. 303.)

CONSTITUTIONAL LAW—Corporations—Business Clothed with Public Interest—Regulation of Charges.—Courts will not grant relief against legislation fixing rates for corporations engaged in a business clothed with a public interest, unless they are so unreasonable as practically to destroy the value of the property used in the business. The basis for testing the reasonableness of rates charged under legislative sanction must be a fair profit on the fair value of the property in use. (p. 304.)

CONSTITUTIONAL LAW—Limit of Legislative Power.—There is no limit upon the power which a state legislature may exercise except that found either in the state or national constitutions. (p. 307.)

L. M. Day, for the plaintiff in error.

Houston & Brooks and H. Whiteside, for the defendant in error.

JOHNSTON, C. J. The validity of chapter 487 of the Laws of 1903, relating to stockyards, is the principal question raised by the pleadings and the decision of the trial court. That act declares and defines what shall constitute public

stockyards, the duties of those operating them, and prescribes maximum charges for the use of the yards and for the facilities and services furnished, viz.: For cattle, fifteen cents per head, calves, eight cents per head, hogs, six cents per head, and sheep four cents per head. There is also contained in the act a regulation of the sale of dead animals, and it finally provides that a violation of its provisions shall be deemed a misdemeanor, the penalties prescribed being a fine of not more than one hundred dollars for the first conviction; for a second conviction a fine of not less than one hundred dollars, nor more than two hundred dollars; for a third conviction, a fine of not less than two hundred dollars, nor more than five hundred dollars, and imprisonment in the county jail for not more than six months; and for each subsequent offense there is imposed a fine of not less than one thousand dollars, and imprisonment in the county jail not less than six months.

⁶ It is contended that the act, if enforced, would infringe the natural right of the defendant to make such contracts in respect to its business as it might choose to make, deprive it of property and compensation for property without due process of law, and violate the federal constitution, particularly the fifth, eighth, and fourteenth amendments of that instrument; and, further, that it conflicts with sections 1, 9 and 20 of the Bill of Rights of the state constitution: Gen. Stats. 1901, secs. 83, 91, 102.

The first main contention is that the Wichita stockyards company is strictly a private corporation, engaged in a purely private business, with full liberty of contract, and is therefore not subject to legislative regulation and control. The state has conferred on the defendant the right to exist as a corporation and to exercise the chartered privileges which ordinarily go with incorporation, but no special franchises or rights have been conferred upon it by either the state or the city of Wichita.

As to corporations which are quasi public in character and in behalf of which the power of eminent domain is exercised—those upon which special privileges have been conferred—there is no dispute. It is conceded by all that these are so far affected with a public interest as to be subject to reasonable regulation and control by the state. But is the enjoyment of special rights and powers conferred by the public the test as to whether a business is impressed with a public interest? Many kinds of business carried on without special franchises

or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people, and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like, are circumstances affecting property with a public interest. Police regulations of the business of dealing in patent rights have been ⁷ maintained on the theory that it affords great opportunity for imposition and fraud: *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327, 45 Pac. 76, 41 L. R. A. 548; *Allen v. Riley*, 71 Kan. 378, 114 Am. St. Rep. 481, 80 Pac. 952.

Public necessity and the public welfare are the broad general grounds upon which the right of legislative control is based, rather than that a special privilege has been conferred in consideration of which public control is conceded or required. In *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, Chief Justice Waite, referring to the right to regulate business under the police power, said: "The government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good": Page 125. Upon these considerations the business of banking has been subjected to control, and the right to regulate the interest which may be charged for the use of money is now unquestioned. The police power is exercised in controlling the business of insurance, the operation of mills, hotels, theaters, wharves, markets, warehouses for the storage of grain and tobacco, common carriers, the collection and distribution of news, and the business of supplying and distributing water and gas. Some of these rest upon considerations of health, or the safety or the convenience of the people, but fall within the general grounds of public necessity and public welfare.

In *La Harpe v. Elm Tp. etc. Gas Co.*, 69 Kan. 97, 76 Pac. 448, it was declared that "the production and distribution of natural gas for light, fuel and power affect the people generally to such an extent that the business may be regarded as one of a public nature, and is almost, if not quite, a public necessity, the control of which belongs to the state": Page 100. That business has the element of transportation, although it includes other elements which affect it with a public interest. The supreme court of the United States has also said, with reference to the regulation of a water company: "That ⁸ it

is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt": *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. ed. 173.

Since the decision of the public elevator cases by the supreme court of the United States there is little room for contention that the business of operating stockyards like those at the city of Wichita is not affected with a public interest, nor within the scope of legislative regulation. In *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, it was expressly decided that a warehouseman, who receives and stores grain for compensation, is engaged in a business of a public nature; that the public has an interest in the use to which he devotes his property; and that for the public good he must submit to public control. Although this decision met with a strong dissent and much protest, it has been affirmed and reaffirmed by the same court, and the principle upon which it rests has been recognized in a multitude of that court's decisions: *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. Rep. 468, 36 L. ed. 247; *Brass v. Stoeser*, 153 U. S. 391, 14 Sup. Ct. Rep. 857, 38 L. ed. 757; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. Rep. 423, 45 L. ed. 619; *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92. These decisions are conclusive authority upon the questions arising under the federal constitution, and following them it must be held that the stockyards business, as conducted at Wichita, is impressed with a public interest, and therefore subject to reasonable statutory control.

The operation of the stockyards has more of the characteristics of a public business than the carrying on of an elevator or a warehouse. It possesses the market features, including considerations of sanitation and health, and it also has more of the monopolistic features. The stockyards in question are situated in a commercial center, and constitute the public livestock [•] market for a great region largely devoted to the livestock business. The principal railroads of the southwest country enter Wichita and their tracks all unite in the stockyards, and the business is therefore intimately related to the business of transportation. Here the stock-raisers and shippers meet and deal with the packers and purchasers, and here livestock in transit from Oklahoma, Texas, and Colorado to more distant markets are unloaded for rest, feeding, and care.

No other market exists nearer than Kansas City on the east, which is about two hundred and sixty miles away, and the nearest ones on the west are Denver and Pueblo, about five hundred miles away. Because of the nature of the business and the railroad facilities the establishment of other markets at or near Wichita is impracticable, and hence these stockyards are, and of necessity will be, the only available place where the breeders, feeders, and dealers of a great scope of country can conveniently market their livestock. The company has, therefore, a practical monopoly of a vast business, affecting thousands of people who are almost obliged to deal at that market, and at the rates which the company may choose to charge. To the company is committed the feeding, watering and weighing of cattle sent from great distances, whether accompanied by the owner or not, and this is an additional reason for regulation and control.

In *Cotting v. Kansas City Stockyards Co.*, 82 Fed. 850, it was held that "a stockyard business, located in a large city, at the junction of many railroad lines, which furnishes the only proper facilities for the unloading, resting and feeding of livestock in transit, and for the sale of cattle within said city, is affected with a public use, so as to be subject to legislative control, and the proper legislative body may prescribe a maximum rate of compensation for the care and handling of stock thereat": Syllabus. This case was taken to the supreme court of the United States, where it was reversed because of a discriminatory provision of the statute under consideration. In determining ¹⁰ that question, however, Mr. Justice Brewer, who rendered the decision, in commenting on the nature of the business of stockyards and the interest of the public in it, took occasion to say: "Tested by the rule laid down in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, it may be conceded that the state has the power to make reasonable regulation of the charges for services rendered by the stockyards company. Its stockyards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and, therefore, must be considered as subject to governmental regulation": *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92.

In *Delaware etc. R. R. Co. v. Central Stockyards Co.*, 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855, the court discussed the nature of the business, and held that the business of maintaining stockyards corresponds with that of warehousemen, and therefore is subject to the same general principles of law. It was held, however, that in the absence of a statute, a court of chancery could not impose regulations upon those engaged in the business without usurping legislative power.

In *New York Stock Exchange v. Board of Trade*, 127 Ill. 153, 11 Am. St. Rep. 107, 19 N. E. 855, 2 L. R. A. 411, it was held that the market quotations and reports of the board of trade of Chicago had become affected with a public interest, and so long as it continued in business it must furnish reports and quotations to all who may desire them for lawful purposes, and upon the same terms. In a later case before the same court it was held that the Chicago Livestock Exchange could not be treated as a public market in the ordinary sense, but in the course of decision it was said that the character and magnitude of its business was such as "to warrant the legislature, in the exercise of its legislative ¹¹ discretion in declaring a public use, and placing said business under legal control and supervision, but such power, in our opinion, does not rest with the courts": *American Livestock Commission Co. v. Chicago Livestock Exch.*, 143 Ill. 210, 36 Am. St. Rep. 385, 32 N. E. 274, 18 L. R. A. 190. See, also, *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. Rep. 441, 28 L. ed. 889; *State v. Edwards*, 86 Me. 102, 41 Am. St. Rep. 528, 29 Atl. 947, 25 L. R. A. 504; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; *State v. Columbus etc. Gas. Co.*, 34 Ohio St. 572, 32 Am. Rep. 390; Freund on Police Power, sec. 373; Cooley's Constitutional Limitations, 7th ed., 870; 1 Tiedeman on State and Federal Control, sec. 85.

We conclude that the stockyards business as conducted in Wichita is clothed with a public interest, and that the state in the exercise of its police power may, within constitutional limitations, subject it to regulation and control.

Having determined that it is competent for the legislature to regulate the business of maintaining stockyards, there is little left of this controversy. It is conceded that the power of prescribing maximum charges for the use of property, including the things and services furnished by the company, is

not without limit. While the fixing of rates in such cases is a legislative function, the regulation must be reasonable, and so it has been held that those carrying on a business affected with a public interest cannot be required to give the use of their property or to perform services without reward, nor to suffer that which would amount to the taking of private property without just compensation or due process of law. It has been said that the court will grant relief against legislation fixing rates for a public service corporation which are so unreasonable as practically to destroy the value of the property used in the business: *St. Louis etc. Ry. ¹² v. Gill*, 156 U. S. 649, 15 Sup. Ct. Rep. 484, 39 L. ed. 567. In another case the court said: "It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that everyone should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others": *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047, 38 L. ed. 1014.

Again it has been held that when the question arises it is the duty of the courts to take into consideration the interests of both the public and the owner of the property devoted to a public use, and determine whether the legislative rates as an entirety are so unjust as practically to destroy the value of the property for all the purposes for which it was acquired: *Covington etc. Turnpike Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. Rep. 198, 41 L. ed. 560. It has been often declared that the basis for testing reasonableness of rates charged under legislative sanction must be the fair value of the property in use: *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819; *San Diego Land Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. Rep. 804, 43 L. ed. 1154; *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92.

The extent to which the courts may interfere with rates established by the legislature is a subject upon which there is a diversity of opinion, and which has not been definitely settled by the supreme court of the United States. In one of the later cases it was said: "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so

plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances ¹³ is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use": *San Diego Land Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. Rep. 804, 43 L. ed. 1154.

In *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92, it was said: "What shall be the test of reasonableness in those charges is absolutely undisclosed. As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which, if enforced, would amount to a confiscation of property. But it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation and leave the property in the hands and under the care of the owners without any remuneration for its use. It has been declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates": Page 91.

In this case it was suggested in the argument that the rates are such as to warrant judicial interference. The answer of the defendant, however, does not fairly raise the question, and the pleader appears to have carefully avoided the making of allegations which would bring the case within the rule of the federal decisions. It is averred that the charges imposed are the customary charges at other stockyards; that they are no more than a just, fair and reasonable compensation for the facilities and labor furnished and for the services rendered; and that any less charges would be ¹⁴ inadequate and insufficient compensation and less than such facilities, labor and services are actually worth. In another paragraph the pleader states: "Defendant therefore avers that whether the intrin-

sic value and worth of the services rendered by it for its aforesaid charges are considered, or whether those charges are compared with the charges made for services rendered by others in connection with such livestock, or for services somewhat similar rendered to other animals, its aforesaid charges are reasonable and fair in themselves, no more than made for similar services at other yards, and are the usual and customary charges everywhere; and that any less charges will be inadequate and insufficient compensation for the facilities and service furnished and rendered, and would not afford defendant any compensation whatever for some of such facilities and services."

But these averments fall short of alleging that the rates imposed by the legislature are so unreasonable and unjust as to amount to the taking of property without just compensation. It does not allege and show, as Mr. Justice Harlan remarked, "clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use": *San Diego Land Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. Rep. 804, 43 L. ed. 1154. The fact that the legislative rates for some services and facilities or for all services and facilities furnished are unreasonable is not enough. The rates prescribed by law, as well as those charged by defendant, are so much per animal handled, and this includes the use of the property devoted to the purpose as well as the services and facilities furnished. The question is, as was said in *Covington etc. Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. Rep. 198, 41 L. ed. 560, whether the legislative rates are, as an entirety, so unreasonable and unjust as to destroy the value of the property devoted to the public use, or to deprive the ¹⁵ owner of property without due process of law. There is nothing in the answer to the effect that the statutory rates, taken as an entirety, will not yield some return, or a reasonable return, on the money invested or on the property devoted to the public use. In one of the latest cases decided by the supreme court of the United States, in refusing to interfere with legislative rates prescribed by the Minnesota railroad and warehouse commission, it was said: "It is sufficient, however, for the purpose of this case to say that the action of the commission in fixing the rate complained of as to this particular class of freight has

not been shown to be so unjust or unreasonable as to amount to a taking of property without due process of law, and we therefore conclude that the judgment of the supreme court must be affirmed": *Minneapolis etc. R. R. Co. v. Minnesota*, 186 U. S. 257, 268, 22 Sup. Ct. Rep. 900, 46 L. ed. 1151.

The statement that the company is only charging such rates as are customary in other stockyards is certainly not the equivalent of allegations to the effect that a less charge would practically destroy the property and money employed in the business, or deprive the owner of it without due process of law.

How far the legislature may go in limiting compensation which corporations engaged in a business clothed with a public interest may charge before it may be regarded as the taking of property without just compensation or due process of law is an important question. May the courts interfere if there is just some reward on the value of the property in use? Or are the owners of the property entitled to a substantial reward—such returns as are ordinarily received on property devoted to a private use, or upon ordinary private investments? Is the corporation entitled to the current rate of interest on the present value of the property devoted to the use? Will less than that be a fair and reasonable return? And if it is not reasonable, measured by the earnings on ordinary investments, ¹⁶ does the enforcement of such rates amount to the taking of property without just compensation? Is there any distinction to be made between rates for public service corporations and public stockyards in respect to the scope of the legislative power? And if the owner devotes his property to a business in which the public has an interest, does he not submit his business and the rates charged the public to the judgment of the legislature as to what is reasonable, so long as the rates are not confiscatory? These questions are so important that it would not become the court to express an opinion upon them until they are fairly raised in the record and it is found necessary to the determination of the rights of the parties.

The averments of the answer do not show that the act of the legislature regulating stockyards violates any of the provisions of the federal constitution mentioned. Nor do we find anything substantial in the claim that the act conflicts with the state constitution, in that the power to pass the act is not expressly delegated to the legislature. In section 1 of article

2 of that instrument (Gen. Stats. 1901, sec. 119) the people expressly vested full legislative power in the House of Representatives and Senate. The legislature represents the people of the state, and there are no limits upon the power which that body may exercise, except such as may be found in the constitution itself, or in the federal constitution.

Nor do we see any merit in the contention that the penalties imposed in the act constitute cruel and unusual punishments, and are so excessive as to render it invalid.

The judgment is therefore reversed, and the cause remanded for further proceedings.

All the justices concurring.

The Business of supplying gas to the inhabitants of a community is of a public nature and subject to public regulation: *Madison v. Madison Gas etc. Co.*, 129 Wis. 249, 116 Am. St. Rep. 944. So is the business of supplying water (*Danville v. Danville Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304), grinding grain (*State v. Edwards*, 86 Me. 102, 41 Am. St. Rep. 528), and elevating grain: *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460. The evolution and diminution of the case of *Munn v. Illinois* is the subject of a note to *San Diego Water Co. v. San Diego*, 62 Am. St. Rep. 289.

CONTINENTAL CASUALTY COMPANY v. JOHNSON.

[74 Kan. 129, 85 Pac. 545.]

INSURANCE, ACCIDENT—Sunstroke.—Insurance against loss of time due to “sunstroke” applies to and includes not only an effect produced by the heat of the sun, but the term, unexplained, includes and denotes a condition of disability produced upon the insured by any heat, solar or artificial, such as heat from a furnace, unless the context of the policy or other special considerations require a different meaning. (p. 312.)

Bowman & Bowman and M. Maverick, for the plaintiff in error.

J. S. Henderson and Branine & Branine, for the defendant in error.

¹²⁹ MASON, J. Grant G. Johnson held a policy of insurance issued by the Continental Casualty Company, the principal purpose of which was to provide indemnity to the amount of ten dollars a week against loss occasioned by accidental injury, its phraseology being that usually employed

in contracts of that character. It also contained a provision as follows: "The loss of . . . time, as above provided, due solely to . . . sunstroke or freezing due solely to ¹⁸⁰ necessary exposure while engaged in his occupation, shall be deemed to be due to external, violent and purely accidental causes and shall entitle the insured to full benefits according to the terms of this policy."

What is called a "health insurance rider" was attached to and made a part of the policy, providing that for time lost by illness and disease the insured should be entitled to receive five dollars a week. Johnson was a flue-welder, and while engaged in that occupation was overcome by heat from the forge or furnace near which he worked, and, in consequence thereof, became ill, and suffered the loss of nearly a year's time. He brought an action upon his policy alleging that his loss was due to sunstroke, and recovered a judgment based upon that theory. The company prosecutes error, and rests its case upon one general contention, which if sound, requires a reversal of the judgment, namely, that the word "sunstroke" as used in the policy referred only to an effect produced by the heat rays of the sun. If, however, the word was there employed in a sense that made it applicable to a condition resulting from artificial heat the judgment must stand, for there was abundant evidence that the plaintiff suffered from sunstroke if that term may be used to describe a disorder so occasioned.

The only definition of sunstroke given in Webster's International Dictionary is as follows: "Any affection produced by the action of the sun on some part of the body; especially, a sudden prostration of the physical powers, with symptoms resembling those of apoplexy, occasioned by exposure to excessive heat, and often terminating fatally."

This language is not free from ambiguity, but seems to recognize two meanings of the word; in the one case as colloquially used in a popular and general sense, referring to any ill-effects resulting from exposure to the direct rays of the sun, and in the other as accurately employed in a scientific and technical way to denote a specific ailment caused by excessive heat from ¹⁸¹ any source. The Standard Dictionary gives but one meaning, as follows: "A sudden cerebral disturbance, often with apoplectic symptoms, due to exposure to excessive heat, generally that of the sun." The definition of the Century Dictionary is not so explicit, but is probably open

to the same construction. It is: "Acute prostration from excessive heat of weather. Two forms may be distinguished—one of sudden collapse without pyrexia (heat exhaustion), the other with very marked pyrexia (thermic fever). The same effects may be produced by heat which is not of solar origin."

The Encyclopedia Britannica thus defines sunstroke, giving heat-stroke as a synonym: "A term applied to the effects produced upon the central nervous system, and through it upon other organs of the body, by exposure to the sun or to overheated air." In the course of the article introduced by the words just quoted it is said: "While attacks of sunstroke are frequently precipitated by exposure, especially during fatigue, to the direct rays of the sun, in a large number of instances they come on under other circumstances. Cases are of not unfrequent occurrence among soldiers in hot climates where there is overcrowding or bad ventilation in their barracks, and sometimes several will be attacked in the course of a single night. The same remark applies to similar conditions existing on shipboard. Further, persons whose occupation exposes them to excessive heat, such as stokers, laundry workers, etc., are apt to suffer, particularly in hot seasons."

The Encyclopedia Americana article on the subject begins: "Sunstroke, prostration due to exposure to intense external heat. Such exposure may be the direct or indirect rays of a tropical sun, or to the excessive heat of an engine-room. In either case heat and physical exertion combine to bring about the results. A high degree of humidity of the atmosphere is one of the most important features, since this hinders free evaporation from the body."

¹³² The New International Encyclopedia treats the word as a synonym of heat-stroke, which it defines thus: "The effect produced upon the body by exposure to intense heat, whether from the sun, from furnaces, or from the atmosphere." The Universal Encyclopedia furnishes this definition: "Fever due to excessive heat, but most commonly to exposure to the direct heat of the sun; indirect solar heat or artificial heat may have the same effect."

A number of medical dictionaries apply the word to a specific fever caused by heat, regardless of its origin, as shown by the following definitions: "Heat-stroke, especially that due to exposure to the sun's rays": Billings, Nat. Med. Dic. "A popular term for insolation or heat-stroke": Gould, New Med. Dic. "A condition resulting from exposure to the heat of

the sun, or to heat from other sources": J. K. Fowler, Dic. of Prac. Med. "Heat-stroke, especially from direct sun-rays": Keating, New Pron. Dic. of Med., 2d ed. "Certain pathological conditions resulting from exposure to solar or artificial heat": Quain, Dic. of Med., 11th ed.

The following named works fail to recognize the application of the term to any case not resulting from solar heat, but whatever significance might otherwise attach to this fact is diminished if not destroyed by the further fact that they treat heat-stroke in the same way, the first five giving it as a mere synonym of sunstroke, and the others ignoring it altogether: Appleton's Medical Dictionary, Lippincott's Medical Dictionary, Dunglison's Medical Dictionary, Foster's Encyclopedic Medical Dictionary, the Encyclopedic Dictionary, Thomas' Medical Dictionary, the Imperial Dictionary, Worcester's Dictionary, Stormonth's Dictionary, Zell's Encyclopedia and Dictionary.

In the work of H. C. Wood, Jr., on Sunstroke it is said: "My own experience is that the only absolutely necessary, and the ever-present, immediate cause [of what ¹³³ the author calls sunstroke] is heat, solar or artificial. It was formerly believed that exposure of the head to the direct rays of the sun was requisite, but this is now well known not to be true. One of my own cases originated in a sugar refinery. Dr. Longmore tells us that out of sixteen cases seen by him in one epidemic, thirteen originated in barracks or hospital": Page 9.

And in Herold's Manual of Legal Medicine: "This affection [sunstroke] is produced by exposure to great solar heat, over-exertion, and an insufficient supply of water. The term is also applicable to those cases occurring as a result of exposure to other sources of extreme heat": Page 421.

And in volume 1 of Peterson & Haines' Text-book of Legal Medicine and Toxicology: "Exclusive of the effects of burns and scalds, heat may produce lethal effects by what is commonly known as sunstroke, heat-stroke, or thermic fever. This condition, presenting several different phases, usually occurs from exposure to the direct rays of the sun, but may be induced by exposure to any excessive external heat if of sufficiently long duration": Page 173.

In volume 3 of Wharton & Stille's Medical Jurisprudence, fifth edition (section 312), cases arising from exposure to the intense heat of the sun are spoken of as "true" sunstroke, and in Draper's Legal Medicine (page 461), it is said

to be correct to speak of such cases as sunstroke, but in each instance the context seems to indicate that what is intended is merely a suggestion that the word as ordinarily employed is in a sense a misnomer.

It seems clear from these authorities not merely that it is permissible to apply the word "sunstroke" to a condition produced by artificial heat, but that it accords with the best usage to do so; that such condition is comprehended within the ordinary meaning of the word wherever it is used with care and precision, whether in technical scientific treatises or in works designed for the general reader. Where the word is used carelessly or ignorantly it may well be supposed that ¹⁸⁴ reference is had to any temporary discomfort resulting from exposure to the direct action of the sun. So in *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197, 26 L. ed. 708, it was held that the statement of a witness that he had had an attack of sunstroke was not necessarily to be taken as an admission that his ailment was in fact a real case of sunstroke, properly so called. But in the drawing of an instrument of the character and importance of an insurance policy the presumption should be that language is selected to express with entire accuracy and correctness the agreements of the contracting parties. And in the present case the word "sunstroke" may be deemed to describe, or at least to be inclusive of, the condition properly called by that name, whether occasioned by solar or artificial heat, unless some special reason exists for giving it a different meaning.

There may be apparent incongruity in calling that sunstroke which has no relation to any effect produced by the sun, but this is only to say that the word is not happily formed to suggest the idea it is employed to express. Etymology is not always a safe guide to the meaning of a term. It is no more imperative that sunstroke shall always mean a disorder caused by the sun than that lunacy shall denote only an aberration due to the influence of the moon. It is true, as urged by counsel for the plaintiff in error, that heat-stroke is a more logically constructed phrase. Words, however, are not to be interpreted by any theory of how they ought to be used, but in accordance with the actual use to which they are put by those whose custom establishes a standard. The history of the word "sunstroke" seems to be that it was coined to describe any suddenly perceived ill-effects of sun heat; as observation disclosed that a definite

morbid condition ordinarily accompanied or followed such an incident the word was applied to that condition in the belief that it was peculiar to cases having that origin; as advancing medical science revealed that such condition was a distinct disease, and might and often did result from ¹³⁵ artificial as well as from solar heat, the doctors, instead of at once inventing a new and more appropriate name, broadened the application of the old one, and their example was naturally and properly followed by others until the usage became general. Later, as a visible mark of the advanced learning on the subject, a more suitable term was originated to describe the disorder—"heat-stroke," the growing employment of which may in time restore sunstroke to its primitive meaning. That this result has not yet been accomplished is evidenced by the fact that the new word is given in but two of the general dictionaries—the Standard and the Encyclopedic—and there merely as the equivalent for the old one. We are not directly concerned with the past or future meaning of the word, but with its present significance, and that, as already indicated, we think is comprehensive enough to cover the defendant in error's case.

The provision of the policy is that sunstroke "shall be deemed to be due to external, violent and purely accidental causes" and shall entitle the insured to indemnity at the full rate. It is argued, not without plausibility, that this language points to a conception of sunstroke as something of sudden and unexpected occurrence, more or less in the nature of an accident, and that this conception is only appropriate to an attack brought on by exposure to the sun's rays. But prostration resulting from heat emanating from a furnace may be as swift in its development and as startling in its effects as though it were occasioned by hot and humid weather. In each case there would be present some of the features of an accidental injury, but neither would justify a recovery upon an ordinary accident policy.

In the only reported cases bearing on the subject (*Dozier v. Fidelity & Casualty Co. of New York*, 46 Fed. 446, 13 L. R. A. 114, and *Sinclair v. Passengers' Ins. Co.*, 3 El. & El. 478, 107 Eng. Com. L. 476, 7 Jur., pt. 1, N. S., 367), in disposing of ¹³⁶ the contention that the holder of an ordinary policy insuring him against accidental injuries is entitled to recover for disability due to sunstroke, it was held that sunstroke is not an accident but a disease. These cases are

frequently referred to by the medical and legal writers and seem to be regarded as definitely settling the proposition to which they are directed. The discussion in the case first named tends to support the view that sunstroke may be caused by artificial heat, and the decision is cited as having that effect in Peterson & Haines' Text-book of Legal Medicine and Toxicology, at page 491. It might not be unfair to assume that the policy here involved was drafted in the light of these decisions. Whether so or not, we see nothing in its language to impair the effect of the presumption that the word "sunstroke" was used in its strictly correct sense. If the company wished to limit its liability under this clause to disability occasioned by natural heat it could easily have so framed the policy as to make this clear, and it should have done so.

The health rider is of course to be deemed a part of the contract. By its terms it covered sunstroke as well as other diseases. But in the body of the policy that disease is singled out and expressly classified as an accident for the purposes of fixing the extent of indemnity afforded against this particular disorder. The liability of the company must be determined by the specific rather than by the general provisions.

Johnson had previously suffered a somewhat similar affliction while holding a like policy from the company, and made a claim and received payment upon the basis of its being ordinary sickness, covered by the rider. Evidence was offered by the company to show the full facts with reference to this matter but was ruled out, and of this complaint is made. We do not think the evidence rejected had any tendency to show an interpretation of the contract by the parties or that the court committed error in this connection.

The jury found that overwork was a contributing ¹³⁷ cause of Johnson's ailment, and the plaintiff in error argues that this should prevent a recovery, because it shows that his condition was not due solely to heat. Severe exertion, according to the authorities already cited, renders one more subject to sunstroke. The fact that the jury found in the present instance that there was over-exertion does not affect the liability of the company. To hold otherwise would be to make the mere negligence of the insured a defense. The established rule is to the contrary: 1 Cyc. 282.

The judgment is affirmed.

All the justices concurring.

Accident Insurance Policies are construed liberally with a view to the protection of the insured. A policy susceptible of two interpretations will be given the one most favorable to him: *Rayburn v. Pennsylvania Casualty Co.*, 138 N. C. 379, 107 Am. St. Rep. 548; *Jones v. Casualty Co.*, 140 N. C. 262, 111 Am. St. Rep. 843; *Aetna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 112 Am. St. Rep. 232.

STOCKER v. DAVIDSON.

[74 Kan. 214, 86 Pac. 136.]

CORPORATIONS—Insolvency—Stockholders' Liability—Trustee in Bankruptcy.—The statutory liability of a stockholder to pay a certain amount upon the debts of the corporation becomes an asset of the corporation in the event of its insolvency. Such liability and the right of action to enforce it, arise upon contract and pass to a trustee in bankruptcy upon his due appointment and qualification. (p. 317.)

CORPORATIONS—Insolvency—Stockholders' Liability—Suit by Trustee in Bankruptcy.—A stockholder's liability in an insolvent corporation may be enforced by a trustee in bankruptcy of such corporation, without judgment against it having first been obtained by its creditors and execution returned unsatisfied, and without the appointment of a receiver for such corporation by the state court. (p. 319.)

Dale & Amidon and Stanley, Vermilion & Evans, for the plaintiff in error.

J. A. Brubacher, for the defendants in error.

²¹⁴ BURCH, J. The plaintiff in error, the trustee in bankruptcy of an insolvent corporation, brought suit against all its known solvent stockholders to enforce their statutory liability. The defendants filed separate demurrers to the petition, which demurrers were sustained on the theory that the trustee took no title to the statutory cause of action against the stockholders, that such liability can be enforced only after judgment and execution against the corporation, and that ²¹⁵ no person but a receiver of the corporation appointed under the state law is competent to bring suits of this character.

The statute under which the defendants' liability arose has been repealed, but, since the obligation is contractual, it is not affected by that circumstance: *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331; *Hawthorne v. Calef*, 69 U. S. 10, 17

L. ed. 776; *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 South. 120; *St. Louis Ry. Supplies Co. v. Harbine*, 2 Mo. App. 134; *Provident Savings Inst. v. Jackson Place Skating etc. Rink*, 52 Mo. 552.

Before the legislative session of 1898 the so-called "double liability" of stockholders in corporations existed as a kind of security obligation which any creditor had the right to enforce for the payment of his debt. By section 15 of chapter 10 of the Laws of 1898 a radical change was made in the character of the liability, in the method of enforcing it, and in the disposition of the funds derived from its enforcement. That section reads: "The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors."

By classifying the liability as an asset of the corporation the legislature stamped it as property, and to the extent of making it available for the payment of debts placed it in the general category of collectible obligations due to the corporation directly. This purpose was made clear by the other provisions of the act. The individual right to enforce the liability was taken away from creditors and given to a representative of ²¹⁶ the corporation itself. The sums collected no longer belonged to creditors in their own right, but constituted a fund for the benefit of all, to be distributed ratably among them. All this is a complete negation of much of the formerly accepted theory of the liability of stockholders, which is correctly stated in volume 1 of the third edition of *Cook on Stock and Stockholders and Corporation Law*, section 218, as follows: "The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. . . . Nor can the corporation upon the insolvency assign it to a trustee for the benefit of creditors. It is a liability running directly and immediately from the shareholders to the corporate creditors. Accordingly, a receiver of an insolvent corporation, invested with 'all the estate, property and equita-

ble interests' of the concern, has no power to enforce such a liability as this."

The law attaches to the shareholder's stock subscription a contract to pay upon the debts of the corporation, in case of insolvency, a sum equal to the par value of his stock. By the enactment quoted the benefit of this contract is, in legal effect, assigned to the corporation for the use of all its creditors, if it becomes insolvent. While the liability is imposed by statute, it is brought into existence by, and is included in, the contract of the stockholder. The right to enforce it is a right of action arising upon contract. It is, therefore, fairly within the meaning of subdivision 6 of section 70a of the bankruptcy act (30 U. S. Stats. at Large, 565), and becomes vested in the trustee in bankruptcy of the corporation upon his appointment and qualification.

It may be conceded that this right of action does not arise upon contract in the sense in which those terms are most frequently employed; that it is not enumerated among the assets of a corporation in the sense of tangible things which may be bought and sold; that it ²¹⁷ vests only after insolvency, and is enforceable only after the management of the corporate enterprise has been taken from its own officers and agents. Still it is a right of action arising upon contract and is an asset belonging to the corporation. The purpose of its creation and preservation is that corporate debts may be satisfied. The provisions of both the state and the federal law upon the subject are designed to accomplish that result. Everything available should be utilized for that purpose. The clear intention of the statutes, considered in their entirety, should prevail over the stark, literal signification of single words or groups of words. The legislative enactment in question should unequivocally show that an asset created to meet the sole contingency of insolvency is rendered unavailable by bankruptcy, in order to be given that interpretation.

If it were not possible to say that title to the cause of action disclosed by the record passed to the plaintiff by virtue of subdivision 6 of section 70a of the bankruptcy act (30 U. S. Stats. at Large, 565), and if in strictness it cannot be classed as property which the bankrupt might have transferred or which might have been levied upon and sold under judicial process within the meaning of subdivision 5 of that section, the trustee's title might be rested upon implication.

There is no provision in the bankruptcy act of 1898, as in the former act, authorizing the trustee to sue upon demands passing to him by virtue of his appointment. But the courts give the law a practical construction and hold the right is conferred by implication: *Pease v. McQuillin*, 180 Mass. 135, 61 N. E. 819. In the case of *In re Baudouine*, 96 Fed. 536. it was said: "The bankruptcy act, however, cannot be construed so narrowly as to exclude any vested interest constituting an asset available to creditors, merely on the ground that this asset is not expressly enumerated in section 70. Other provisions of the bankrupt act show that the act is designed to cover all the property and estate of the bankrupt and all assets that can in any ²¹⁸ manner be legally made available for the payment of his debts, and to distribute all those assets equally among his creditors. As an incident to this complete distribution of assets, it further provides for the bankrupt's discharge from his debts. A discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors would be not only a glaring wrong to creditors but contrary to every conception of a just system of bankruptcy": Page 539.

And in the case of *Spencer v. Duplan Silk Co.*, 112 Fed. 638, it was said: "It is, no doubt, true, speaking generally, that under section 70a of the bankruptcy act, the trustee takes no better title to the property than the bankrupt himself possessed; but there are exceptions to this statement, as plainly appears from other provisions of the act. Under certain circumstances the trustee is the representative of the creditors, rather than of the bankrupt, in relation to the property of the estate, and he may unquestionably exercise rights and enforce a title that the bankrupt himself could neither enforce nor exercise": Page 642.

These decisions announce the correct rule of interpretation, and the plaintiff in this case is invested with title to the cause of action described in the petition and is authorized to bring suit upon it.

Section 14 of chapter 10 of the Laws of 1898 provides that if property of the corporation cannot be found upon which to levy execution issued at the behest of judgment creditors the corporation shall be deemed to be insolvent. A receiver may then be appointed and the liability of the stockholders enforced. From this it is argued that the trustee

in bankruptcy has no right to sue until after judgment in a state court against the corporation and the return of execution unsatisfied. Section 15, *supra*, makes the stockholders' liability as a corporate asset collectible in the event of insolvency, without restriction. Section 14 provides but one method of ascertaining the fact of insolvency. An adjudication in bankruptcy is another, ²¹⁹ and whenever insolvency is lawfully established the right to enforce the stockholders' liability accrues. If, however, judgment and execution were contemplated by the statute as preliminary steps to the enforcement of the stockholders' liability, the adjudication in bankruptcy under paramount law would excuse the taking of them.

"The law does not require the doing of a vain thing, and, therefore, where the company has become wholly insolvent, has ceased to do business, and assigned all its property to a trustee for the benefit of its creditors, the suit to enforce their statutory liability may be commenced against the stockholders by the creditors, without any of them first recovering a judgment against the company and having an execution issued and returned unsatisfied: *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558; *Thompson on Liability of Stockholders*, sec. 321": *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259.

"Although it has been held by the court of appeals, in the case of *Rocky Mountain Bank v. Bliss*, 89 N. Y. 338, that a judgment in a court of the state of New York was necessary to fix the liability of a stockholder under section 10 of the act under consideration, yet the same court, in the case of *Shellington v. Howland*, 53 N. Y. 371, held that in an action brought to charge a defendant as stockholder in a company organized under the same law an adjudication in bankruptcy of the company excused a compliance with the condition which required a suit to be brought against the company within a year after the maturity of the debt and a judgment to be recovered and an execution to be issued thereon and returned unsatisfied. We see no reason why we should not follow this decision, and it is conclusive of the question under consideration": *Flash v. Connecticut*, 109 U. S. 371, 380, 3 Sup. Ct. Rep. 263, 27 L. ed. 966. See, also, *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229.

Finally, it is contended that the specific procedure prescribed by the state statute must be followed, and that no person except a receiver appointed by the state court can bring

the action. The essentials of this procedure are that it must be instituted by an officer ²²⁰ of court and not by the stockholders themselves; that it shall be by action and not by special proceeding; that the sums collected shall constitute a fund for the benefit of all creditors; and that such fund shall be distributed by the direction of a court having power to protect all interests. These conditions are met in every particular except that the official who brings the suit is called a trustee instead of a receiver, and that he is appointed by the bankruptcy and not by the state court. Every matter of substance is present, and mere matters of form and name cannot defeat the proceeding.

The judgment of the district court is reversed, and the cause is remanded, with direction to overrule the demurrers to the petition.

All the justices concurring.

The Statutory Liability of Stockholders in a corporation is usually regarded as contractual: *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229; *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611; *Crippen v. Loughton*, 69 N. H. 540, 76 Am. St. Rep. 192; *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194. As to whether it is enforceable by the corporation or by its receiver or assignee in insolvency, see *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888; *Cook v. Carpenter*, 212 Pa. 165, 108 Am. St. Rep. 854. When a corporation has become insolvent, has ceased to do business, and has assigned its property for the benefit of creditors, a suit to enforce their statutory liability may be commenced against the stockholders by creditors, without their first recovering judgment and having execution returned unsatisfied: *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798. See, however, *Wehn v. Fall*, 55 Neb. 547, 70 Am. St. Rep. 397.

BRANDON v. ARD.

[74 Kan. 424, 87 Pac. 366.]

JUDGMENTS—Res Judicata.—A judgment against the general government in an action to cancel a patent to a railroad company does not estop a homestead settler from pleading such settlement in defense to an action in ejectment brought against him by the railroad company's grantee. (p. 325.)

PUBLIC LANDS—Grants and Reservations—Withdrawal from Settlement.—If a grant to a railway company expressly reserves from its operation all lands to which the right of pre-emption or homestead settlement has attached when the line is definitely fixed, the United States land commissioner, in the absence of express authority, and prior to the definite location of the line, has no power to issue an order withdrawing any of such lands from pre-emption or homestead settlement. (p. 327.)

PUBLIC LANDS—Grants and Reservations—Authority of Land Commissioner.—If public lands are granted to a railroad, with certain reservations for purposes designated in the grant, in the absence of express authority the Secretary of the Interior or land commissioner is powerless to make any order with reference thereto which will have the effect to defeat such reservations. (p. 331.)

L. W. Keplinger, for the plaintiffs in error.

Ewing, Gard & Gard, for the defendant in error.

424 GREENE, J. This was an action for the possession of the north half of the northeast quarter of section 11, township 26, range 20, in Allen county, brought by Alexander Brandon against Newton Ard. Since the action was commenced Alexander Brandon died, and it has been revived in the name of his executors and heirs. The defendant recovered judgment and the plaintiffs bring the case here for review.

The plaintiffs claim title by a deed from the Missouri, Kansas and Texas Railway Company, which held by patent from the governor of Kansas, dated May 19, 1873, issued by virtue of a grant of land by the United States to the state of Kansas, dated March 3, 1863, to aid in the construction of railroads and telegraphs. The act provides that there shall be granted every alternate section of land, designated by odd numbers, **425** for ten sections in width on each side, in aid of the construction of the following roads, and each branch thereof: First, a railroad and telegraph line from the city of Leavenworth, Kansas, by way of Lawrence and the Ohio City crossing of the Osage river to the southern line of the

state, in the direction of Galveston bay, in Texas, with a branch from Lawrence, by the valley of the Wakarusa river, to a point on the Atchison, Topeka and Santa Fe railroad where that road intersects the Neosho river; second, a railroad from the city of Atchison, Kansas, via Topeka, to the western line of the state, in the direction of Fort Union and Santa Fe, New Mexico, with a branch where the latter crosses the Neosho, down the Neosho valley to the point where the road first named (the Leavenworth road) enters the Neosho valley. This grant contains the following limitations: "But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the state of Kansas for the use and purpose aforesaid; provided, that the land to be so selected shall in no case be located further than twenty miles from the lines of said road and branches; provided, further, that the lands hereby granted for and on account of said roads and branches severally shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work ⁴²⁶ progresses through the same, as in this act hereinafter provided": 12 U. S. Stats. at Large, 772.

The corporation known as the Atchison, Topeka and Santa Fe Railroad Company acquired the right to the lands designated under the second subdivision of this act, and all rights granted it by this act for the construction of its branch from a point at or near Fort Riley down to the Neosho valley to where the Leavenworth road might enter the Neosho valley were assigned to and became vested in the Missouri, Kansas and Texas Railway Company on March 3, 1866, and this

assignment was ratified by the legislature of Kansas, February 26, 1867.

Following the passage of the federal act of 1863, and on March 19, 1863, the commissioner of the land office, without being advised by the filing of a plat of general location of the road, and solely upon the request of the senators and representatives in Congress, from Kansas, transmitted to the register and receiver of the local land office at Humboldt, Kansas, a letter of withdrawal, and a diagram showing the probable lines of the Leavenworth, Lawrence and Galveston railroad. The letter of withdrawal contains the following insertion:

“You will, therefore, understand from the foregoing:

“(1) That the odd sections within the limits of said railroads and branches are absolutely withdrawn from sale, pre-emption, or homestead entry, except so far as inceptive rights may have accrued prior to the receipt by you of this order.”

The land in controversy is a portion of the lands described in the diagram. In 1867 the Leavenworth, Lawrence and Galveston road filed its map of definite location. It was then found that the land in question was outside its place limits but within its indemnity limits. The Missouri, Kansas and Texas railroad definitely located its line in December, 1866, and the land in controversy fell without its place limits, but within its indemnity limits. The land was, therefore, outside ⁴²⁷ the place limits, but within the overlapping indemnity limits of both roads. This land was selected by the Missouri, Kansas and Texas railroad as indemnity lands, and was patented to it by the patent hereinbefore referred to, and was conveyed to Alexander Brandon by the railroad company. The west half of the southeast quarter of section 2, township 26, range 20, which adjoins the tract in controversy, was selected by the Leavenworth, Lawrence and Galveston railroad as indemnity lands, and was patented to it November 3, 1873. The company sold this land to Charles H. Pratt.

Ard claims title to both tracts under a homestead settlement made in June, 1866. He possessed all the necessary qualifications to homestead one hundred and sixty acres of land of the public domain. In June, 1866, he settled and made substantial improvements on this land, for the purpose and with the intent of perfecting a title thereto as his homestead. On July 14, 1866, he prepared his homestead application in due form, and the requisite affidavits, went to the local

land office at Humboldt with his witnesses, and presented his application and affidavits, and tendered the entry fee to the proper officers, and requested that he be allowed to enter the two tracts as a homestead. His application was rejected by the officer in charge on the ground that the lands had been withdrawn from pre-emption and homestead entry by the instructions contained in the letter of the commissioner of the land office of March 19, 1863. Mr. Ard returned to the land, and has been in the actual occupancy thereof since his original entry, always claiming the right to enter it as a homestead. He subsequently made several applications to the local land officers for permission to enter this land as a homestead, but each time was denied the right for the same reasons assigned on his first application, until December 21, 1896, when he was permitted to make homestead entry, upon which a patent was issued December 17, 1900.

In June, 1887, separate actions in ejectment were ⁴²⁸ commenced in the district court of Allen county by Pratt and Brandon against Ard for the possession of these lands, Pratt claiming the land in section 2 under his purchase from the Leavenworth, Lawrence and Galveston railroad, and Brandon claiming the tract now in controversy under his purchase from the Missouri, Kansas and Texas railroad. The causes were tried in the district court, and Ard was defeated. He prosecuted separate proceedings in error to this court, where both judgments were affirmed: *Ard v. Pratt*, 43 Kan. 419, 23 Pac. 646; *Ard v. Brandon*, 43 Kan. 425, 23 Pac. 648. Ard appealed both cases to the supreme court of the United States, where the judgments of the district court, as well as the judgments of this court, were set aside, and the causes remanded for retrial: *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. Rep. 406, 39 L. ed. 524. Afterward, and while they were awaiting a retrial in the district court of Allen county, the United States, under act of Congress passed March 3, 1887, requiring the immediate adjustment by the Secretary of the Interior, in accordance with the decisions of the supreme court of the United States, of all unadjusted land grants made by Congress to aid in the construction of railroads (24 U. S. Stats. at Large, 556), commenced an action in the United States circuit court for the district of Kansas against the Missouri, Kansas and Texas railroad and other railroad companies to cancel their patents to certain even-numbered sections of land in Allen county. Subsequently the bill was amended, and cer-

tain odd-numbered sections within the indemnity limits were included, and all parties holding such lands under deed from the railroads appear to have been made defendants. By the amended bill the land in question was included in the action, and Alexander Brandon was made a defendant. In this action the United States was unsuccessful, and judgment was rendered against it: *United States v. Missouri etc. Ry.*, 141 U. S. 358, 12 Sup. Ct. Rep. 13, 35 L. ed. 766. Ard was not a party to that action, and was not represented, ⁴²⁹ unless it can be said, as claimed by the plaintiffs, that he was a party by representation—that is, that the United States was the representative of all persons claiming adversely to the Missouri, Kansas and Texas railroad.

Plaintiffs contend: 1. That the judgment against the United States in the case of *United States v. Missouri etc. Ry.*, decided in the circuit court of the United States, and afterward taken to the supreme court (141 U. S. 358, 12 Sup. Ct. Rep. 13, 35 L. ed. 766), was a full and complete judicial determination that Ard had acquired no equity in the real estate by his settlement and several attempts to homestead it, and that such judgment is a complete bar against his contentions in this action; 2. That the letter of the land commissioner of March 19, 1863, withdrawing all the odd-numbered sections for ten miles on each side of what he supposed would be the line of the Leavenworth, Lawrence and Galveston railroad was a segregation and setting apart of this land for this railroad company—a withdrawal from market of all odd-numbered sections indicated in the diagram—and that the lands thus withdrawn remained permanently exempt from pre-emption entry and homestead settlement.

We do not agree with the first contention. The action of the United States against the several railroad companies was not commenced, as suggested by plaintiffs, by the procurement of Ard. It was brought by the attorney general of the United States at the request of the Secretary of the Interior, under the act of Congress of March 3, 1887, authorizing and directing the Secretary of the Interior “to immediately adjust, in accordance with the decisions of the supreme court, ⁴³⁰ each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted”: 24 U. S. Stats. at Large, 556. Ard, by settling upon this land and attempting to perfect a homestead title thereto, did not thereby become a ward of the government. He did not con-

stitute the United States his trustee to litigate for him his equitable rights to the land upon which he had settled, nor did it become such trustee by operation of law. Ard was not made a party to the action. He had no control or supervision over any issue in the case. He was asking nothing at the hands of the court, and so far as anything appears to this court, no person was asking anything against him.

The act did not authorize the Secretary of the Interior to institute proceedings in equity to settle controversies arising between individual claimants to these lands, nor to adjust disputes between the railroad companies and persons claiming adversely to them. The action was one to determine the right of the railroad companies to hold the legal title to these lands as against the United States. The questions involved were those arising exclusively between the United States on the one side and these corporations and persons claiming the legal title to the lands under them on the other side. Ard was not made a party because his equitable claim to the land, as against the railroad company or its grantee, was not involved, and could not be determined. The United States was not interested in the litigation pending between Ard and Brandon involving their equitable rights to any particular tract of land. In *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. Rep. 406, 39 L. ed. 524, it was urged that, under the authorities of the cases of *Kansas City etc. R. R. Co. v. Brewster*, 118 U. S. 682, 7 Sup. Ct. Rep. 66, 30 L. ed. 281, and *United States v. Missouri etc. Ry.*, 141 U. S. 358, 12 Sup. Ct. Rep. 13, 35 L. ed. 766, sustaining the regularity and validity of certain patents to the ⁴⁸¹ Missouri, Kansas and Texas Railroad Company, an individual could not thereafter contest nor question the right of the company to any lands to which it held patent. In the opinion, referring to these cases, the court said: "No adjudication against the government in a suit by it to set aside a patent estops an individual not a party thereto from thereafter setting up his equitable rights in the land for which the patent was issued": Page 541.

It is also contended that if it should be held that Ard was not a party by representation to the suit in *United States v. Missouri etc. Ry.*, 141 U. S. 358, 12 Sup. Ct. Rep. 13, 35 L. ed. 766, and is not for that reason concluded, he should nevertheless, by reason of his presence and participation in that action, be held to be estopped by that judgment. We have no doubt of the correctness of the rule that one not a party to the

record may, by his conduct in directing, managing, and actually participating in the trial, be estopped by the judgment therein as to any question actually litigated and decided. However, the vital question in this case is the effect of the order of withdrawal, and we do not find that this question was tendered by the bill, nor litigated in the action, or determined by the judgment.

Plaintiffs' second contention—that the diagram and order of withdrawal of March 19, 1863, had the effect to segregate all the lands included in the diagram from the public domain and set it apart for the exclusive use of railroad companies—is not well founded, nor was such the understanding of the land department, as is conclusively shown by the order from that department to the local land office of April 20, 1866, after the Leavenworth, Lawrence and Galveston railroad had filed its map of definite location, directing the withdrawal of certain lands for its benefit. In this letter the commissioner said: "Also, where settlement may have been made on an odd-numbered section outside of the ten and within ⁴³² the twenty mile limits prior to the receipt by you of this order of withdrawal, the settler will be protected in his rights by reason of such prior settlement."

Regardless of any interpretation subsequently placed upon the order of withdrawal of March 19, 1863, by the land commissioner, and regardless also of what such order contained, the grant itself reserved from its operation all of the public domain which had, prior to the definite location of any line of road, been sold by the United States or otherwise reserved, and all the lands to which, prior to such definite location, the right of pre-emption or homestead settlement had attached, and lands falling within any of these provisions when the line was definitely fixed were excluded from the granting clause of the act. Ard's homestead rights attached prior to the definite location of any line of railroad. He is therefore within the exact provision of one of the reservations in the grant. The pretended withdrawal, if given the effect contended for by plaintiffs, would be giving such commissioner power to nullify one of the important reservations in the grant. This precise question was before the supreme court in *Nelson v. Northern Pac. Ry.*, 188 U. S. 108, 23 Sup. Ct. Rep. 302, 47 L. ed. 406. The grant contained the following reservations: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of

aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise apportioned, and free from pre-emption, or ⁴³³ other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections": 13 U. S. Stats. at Large, 367.

An order of withdrawal dated November 1, 1873, was issued by the commissioner of the land office, which included the land in controversy in that action. Subsequently, in 1881, and before the railroad company had definitely located its line, Nelson made a homestead settlement upon a portion of the land within the place limits as shown by the map of definite location. The contention is that the withdrawal order withdrew the land from pre-emption and homestead settlement. In the opinion, the court said: "But we have also seen, looking at the third section, which was the granting section of the act, that Congress did not grant every odd-numbered alternate section within the general limits specified, but only the odd-numbered alternate sections to which the United States had full title, and which had not been previously reserved, sold, granted or otherwise appropriated, and which were free from pre-emption or 'other claims or rights' at the time the line of the road was definitely fixed—giving to the railroad company the right to select lands, within certain limits, in place of such as were found, at the date of definite location, to

have been disposed of or to be 'occupied by homestead settlers' ": Page 116.

It was held that the order of withdrawal did not withdraw the land from homestead settlement, and many cases were cited sustaining this conclusion. In the opinion the expressions used by Mr. Justice Field in *Buttz v. Northern Pac. R. R.*, 119 U. S. 55, 7 ⁴³⁴ Sup. Ct. Rep. 100, 30 L. ed. 330, relied upon by plaintiffs, to the effect that when the general route of that road was made known by a map duly filed and accepted "the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side; the object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted," are quoted and commented on as follows: "But it is evident, in view of both prior and subsequent decisions, that this language is not to be taken literally or apart from the other portions of the opinions of the eminent jurist who delivered the judgment of the court. If, upon the filing and acceptance of the map of general route, the law withdrew the odd-numbered sections, then the previous holding in many cases that until definite location the grant was a float, with no interest in specific sections being acquired by the railroad company, would be meaningless; and there would be some difficulty in Congress appropriating such lands prior to definite location. Indeed, it is manifest that the court did not mean to announce any new doctrine in the *Buttz* case; for Mr. Justice Field, when delivering judgment in that case, said that the charter of the Northern Pacific Railroad Company contemplated 'the filing by the company, in the office of the commissioner of the general land office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time, been reserved, sold, granted, or otherwise appropriated, and free from pre-emption, grant, or other claims or rights' ": Page 120.

Again, in the later case of *Sjoli v. Dreschel*, 199 U. S. 564, 26 Sup. Ct. Rep. 154, 50 L. ed. 311, it was said: "From the numerous cases in this court relating to the above act of July 2, 1864, the following propositions are to be deduced: . . . That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior;

"That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of

selections, are subject to be disposed ⁴³⁵ of by the United States or to be settled upon or occupied under the pre-emption and homestead laws of the United States; and,

“That the Secretary of the Interior has no authority to withdraw from the sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company’s road”: Page 565.

A critical examination of the cases which are said to maintain a contrary rule will show that they were cases arising under grants which directly authorized a withdrawal, or between original and subsequent grantees claiming the same lands, and in the latter cases the question was what was to be understood by the term “public lands,” as used in the subsequent grant—that is, whether it was exclusive of lands covered by a former grant not yet earned. It happened in many cases that the lands covered by a prior grant had been withdrawn by the Secretary of the Interior, but this was not the controlling feature of the decisions. The holdings generally have been that the term “public lands,” as used in the subsequent grant, excluded lands included within prior grants.

The case of *Wolsey v. Chapman*, 101 U. S. 755, 25 L. ed. 915, cited by plaintiffs, belongs to the first class. There the controversy arose over a general land grant made to the state of Iowa of five hundred thousand acres of land for internal improvements, dated September 4, 1841. These lands were to be selected from any public lands, “except such as is or may be reserved from sale by . . . proclamation of the President of the United States”: 5 U. S. Stats. at Large, 455. April 6, 1850, the Secretary of the Interior directed that certain lands in the state of Iowa be reserved from sale in order to settle the rights of rival claimants thereto. On July 20, 1850, the agent of the state of Iowa, having in charge the school lands and school fund, gave notice at the general land office that he had selected a portion of lands thus withdrawn as a part of the five hundred thousand ⁴³⁶ acre grant under act of 1841. It was held that the order of withdrawal was authorized by the grant and all lands which had at the time been reserved and all that might thereafter be reserved by the proclamation, of the President were excepted from the grant. It was also held that the order of withdrawal issued by the Secretary of the Interior must be held to have been by proc-

clamation of the President and was the withdrawal provided for in the grant.

The case of *Northern Lumber Co. v. O'Brien*, 139 Fed. 614, 71 C. C. A. 598, also relied upon by plaintiffs, does not involve the question we are called upon to decide. It does, however, recognize the rule as here stated. In distinguishing the question presented to it from the one in *Nelson v. Northern Pacific Ry.*, 188 U. S. 108, 23 Sup. Ct. Rep. 302, 47 L. ed. 406, and other similar cases, the court said: "None of these cases has particular reference to or makes the decision turn upon the clause 'there be, and hereby is, granted every alternate section of public land,' which makes the grant one in praesenti of land then public, but instead each has particular reference to and makes the decision turn upon the limitation on the granting clause, which makes it also requisite that 'the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed.' They all recognize the well-established rule, that the grantee under a railroad land grant acquires, by designating the general route of its road, only an inchoate right to the odd-numbered sections granted by Congress, and that until the definite location of the road these sections remain within the disposing power of Congress, and this, even though they be withdrawn for the protection of the grant, as in the present case": Page 620.

The well-established rule, therefore, is that where lands are granted to a railroad, with certain reservations, for purposes designated in the grant, in the absence of express authority the Secretary of the Interior or the land commissioner is powerless to make any order with reference thereto which will have the effect to defeat ⁴³⁷ the reservations. Congress has exclusive authority to dispose of the public domain, and in the absence of its adoption of any specific rule for carrying out its purpose the land department may adopt such rules and regulations as to it may seem proper for that purpose; but in the absence of express authority that department is powerless to adopt a procedure which will defeat the expressed intention of Congress in the disposition of the public domain. Congress, in the grant in question, expressly reserved from its operation all lands sold or reserved by the United States or to which the right of pre-emption or homestead settlement attached when the line of railroad or its branches should be

definitely fixed. The lands falling within these reservations were not granted to the railroad companies, and the land commissioner had no authority by any act to deprive those for whose benefit the reservations were made of the privilege of exercising that right. The judgment is affirmed.

All the justices concurring.

Judgments bind only parties and privies: Cope v. Payne, 111 Tenn. 128, 102 Am. St. Rep. 746; Gouwens v. Gouwens, 222 Ill. 223, 113 Am. St. Rep. 395; Nickum v. Burckhardt, 30 Or. 464, 60 Am. St. Rep. 822; Fuller v. Metropolitan Life Ins. Co., 68 Conn. 55, 57 Am. St. Rep. 84. The term "parties" includes those who are directly interested in the subject matter of the suit, knew of its pendency, and had the right to control and direct or defend it: Courtney v. William Knabe etc. Co., 97 Md. 499, 99 Am. St. Rep. 456. The question as to who are parties within the rule of res judicata is further considered in the note to Hill v. Bain, 2 Am. St. Rep. 876.

KUHN v. NATIONAL BANK.

[74 Kan. 456, 87 Pac. 551.]

VENDOR AND PURCHASER—Notice of Existing Liens.—A purchaser of land, in the absence of fraud, takes the title thereto subject to all liens which are properly of record, and also subject to all other liens of which he has actual notice. (p. 333.)

SUBROGATION—Payment of Mortgage—Notice of Judgment Lien.—A purchaser of land with knowledge that three mortgages and two judgments are then subsisting liens thereon, who assumes and agrees to pay the mortgage debts, but ignores the judgment liens, is not entitled, having paid one mortgage, to be substituted to the position of the holder of the mortgage paid, and to have that mortgage considered unpaid when an attempt is made to sell the land on execution to satisfy the judgments. (p. 334.)

SUBROGATION—Purchaser—Payment of Liens.—An independent purchaser of land encumbered with liens, who has no interest to protect therein, and no other equitable claim, cannot assume the payment and pay such lien or liens as he may choose, and claim subrogation as against all inferior liens. (p. 335.)

Hursh & Walton and J. D. Myers, for the plaintiff in error.

Hayden & Hayden, for the defendants in error.

457 SMITH, J. The plaintiff in error, having at the time no interest whatever in or lien upon the land, purchased a tract of land which was encumbered by three mortgages. At

the time of the purchase, and for some time prior thereto, abstracts of two judgments rendered by a justice of the peace against Kuhn's grantor and in favor of the National Bank of Holton had been on file in the district court of Jackson county, in which county the land was located, and such judgments were liens upon the land in question. By his contract of purchase Kuhn assumed and agreed to pay the mortgages against the land and all unpaid taxes thereon. He paid one of the mortgages, procuring the money therefor principally by a loan which he secured by executing a new mortgage on the land. Subsequently Kuhn paid the mortgage given by him to secure the loan, leaving only the two mortgages which he had assumed to pay and the two judgments as liens upon the land.

Thereafter the National Bank of Holton, the owner of the two judgments, caused execution to be issued thereon, and the sheriff of Jackson county, not finding goods or chattels of the judgment debtor to satisfy the executions, levied the same upon the land in question and advertised it for sale, subject only to the two unpaid mortgages. Thereupon Kuhn brought this suit in the district court of Jackson county to enjoin the bank and the sheriff from proceeding with the sale. A temporary injunction was granted during the pendency of the suit, and in due time a trial was had before the court and the temporary injunction was dissolved, a permanent injunction was refused, and judgment was rendered against the plaintiff. He brings the case here for review.

⁴⁵⁸ Two objections to the action of the court in this case are presented: 1. The exclusion of evidence offered to show that the plaintiff had no actual knowledge of the existence of the judgments or judgment liens on the land at the time he purchased it; 2. That, upon the facts, not the defendants but the plaintiff was entitled to judgment.

If, as it has uniformly been decided, a purchaser of either real or personal property is bound to take notice of the facts affecting the title to property which the records of the county show, and which records the statutes provide shall be public notice, then it is quite immaterial whether or not Kuhn had actual knowledge of the existence of the judgments. In the absence of conduct on the part of the person who afterward asserts the facts shown by the records to the prejudice of the purchaser which prevents an examination of the records or induces the purchaser not to make such examination, it

is negligence for a purchaser of either real or personal property to make the purchase without ascertaining the facts shown by the records which may affect the title to be acquired. In the absence of such fraudulent conduct the purchaser will be presumed to have bought with knowledge of all the facts which the records at the time would have disclosed. Equity cannot be invoked to relieve one from the consequences of his own negligence: *Hargis v. Robinson*, 63 Kan. 686, 66 Pac. 988.

If, then, as is to be presumed, Kuhn bought the land with knowledge that the three mortgages and two judgments were subsisting liens thereon, and assumed and agreed to pay the mortgage debts but ignored the judgment liens, is he entitled, having paid one mortgage, ⁴⁵⁹ to be substituted to the position of the holder of the mortgage paid and to have the mortgage considered unpaid when an attempt is made to sell the land on execution to satisfy the judgments? If so, having paid the senior mortgage lien, could he not, in a suit to foreclose the second mortgage, claim subrogation as to the first? Or, having paid the first and second, could he not claim subrogation as to both, in a suit to foreclose the third? Sufficient answer it is to say that the equitable relief of subrogation was not designed to aid speculation nor to relieve litigants from the consequences of their own negligence, ignorance or mistakes of judgment: *Hargis v. Robinson*, 63 Kan. 686, 66 Pac. 988. This equitable relief originated in the evident justice of substituting a surety who has been compelled to pay the debt of his principal to the place of the creditor as against other creditors affected by the transaction. It has on principle been extended to the relief of junior lienholders who, to protect their own interests, have been compelled to pay off prior liens, and to other cases where natural justice required its application and where no violence was done to legal rights of others.

It is urged in behalf of plaintiff that at the time he bought the land in question it was of no greater value than the amount of the three mortgages and taxes due thereon. We are not cited to any evidence and have scanned the record in vain to find evidence in support of this assertion. Whether the land was worth more or less than the debts assumed, which constituted the only consideration for the purchase, is probably immaterial. At the time Kuhn made the purchase he had no interest in the land to protect. At

the time he paid the Myers mortgage he did not stand in the relation of surety for its payment; by his contract he had made it his debt. He became the principal debtor, and his grantor, who executed the note and mortgage, became the surety: *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Rouse v. Bartholomew*, 51 Kan. 425, 32 Pac. 1088.

⁴⁶⁰ We have not been cited to any authority, nor have we found any, supporting the proposition that an independent purchaser of real property encumbered with liens who has no interest to protect therein, and no other equitable claim, can assume the payment and pay such lien or liens as he may choose and claim subrogation as against all inferior liens, save the cases of *Darrough v. Herbert Kraft Co. Bank*, 125 Cal. 272, 57 Pac. 983, and *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. 92. These cases do not appear to be in accord with the weight of authority nor with the accepted reason for granting this equitable relief, and are disapproved. The case of *Young v. Morgan*, 89 Ill. 199, does not appear to be in point, as the land in question was a homestead at the time of the sale and the judgment creditor had no lien thereon; the homesteader had a right to sell the land clear of creditors' claims.

The case of *Plumb v. Bay*, 18 Kan. 415, is cited in support of plaintiff's claim. In that case the mortgage paid by Plumb, the lien of which was preferred to an apparently prior judgment lien, was given for the purchase price of the land. In *Bowling v. Garrett*, 49 Kan. 504, 33 Am. St. Rep. 377, 31 Pac. 135, the purchaser had a mechanic's lien on the land to protect at the time he purchased it, and his equity for this and for a mortgage on the land which he had assumed and agreed to pay as a part of the purchase price, and afterward had in part paid, was preferred to the lien of a judgment rendered in an action begun after the mechanic's and mortgage liens had attached.

The decisions of this court have been liberal in allowing subrogation where any equity required it and no legal right of others was encroached upon, but in no case does it appear the court has gone to the extent demanded in this case. Whether Kuhn would have purchased the land had the judgment liens been brought to his attention, assuming he had no knowledge of them, is a question of pure speculation, as they were for small amounts. Being charged with the knowledge⁴⁶¹ of these liens, and having no interest to protect, he must

be held to have simply stepped into his grantor's shoes. When he paid off a mortgage that was prior to the judgment lien it had the same effect as if the payment had been made by the grantor before he parted with his title.

The judgment of the district court is affirmed.

All the justices concurring.

The Right to Subrogation is the subject of an extended note to *American Bonding Co. v. National Mechanics' Bank*, 99 Am. St. Rep. 474.

BARE v. FORD.

[74 Kan. 593, 87 Pac. 731.]

BILLS AND NOTES—Lost Notes—Allegation and Proof.—In an action to recover on a mortgage note, a copy of which is set forth in the complaint, evidence of loss of the note and of its execution and contents is admissible, although no allegation of its loss is made in the complaint. (p. 337.)

MORTGAGES.—If Payment, Satisfaction, or Settlement of a mortgage is not pleaded, neither can be proved under the general issue. (p. 339.)

H. J. Bone and D. R. Hite, for the plaintiffs in error.

F. C. Price, for the defendant in error.

594 JOHNSTON, C. J. This was a suit to foreclose a mortgage. On December 1, 1887, C. J. McCray and wife gave a promissory note for eight hundred dollars to Samuel G. Miller, due five years after date, and to secure its payment executed a mortgage on a quarter section of land in Clark county. On June 30, 1902, C. W. Carson purchased the note and mortgage for his sister, J. C. Ford, as a gift, taking a written assignment of each directly to her. The mortgage was delivered with the assignment, but there was no manual delivery of the note, as it appears to have been lost. Carson placed the mortgage and assignments in the hands of Ford's attorney for foreclosure, but she was not aware that she had become the owner of the instruments until after the suit was brought, and upon learning of the gift and action she prosecuted the proceeding to a conclusion. The petition was in the ordinary form for foreclosure, alleging the execution

of the note, the sale and indorsement of the same from Miller to Ford before maturity, and a copy of it, with the assignment, was set forth. Default was made by the McCrays on the note, but J. O. Bare and wife, who had also been named as defendants, answered with a general denial, and, further, that the plaintiff was not the real party in interest; that the cause of action was barred by the statute of limitations; and that they had acquired the land by a tax deed executed by the county of Clark. Ford replied, denying generally the allegations of the answer, and also stating that the tax deed to Bare was void because of several defects in the tax proceedings. On the issues so formed the jury found in favor of the plaintiff, and the mortgage was adjudged to be a valid lien on the land, the defendants' tax deed was held to be illegal and set aside, but the tax paid by the Bares, with the ⁵⁹⁵ accumulated interest, was declared to be a lien upon the land.

The Bares complain, and insist that the evidence was insufficient to establish a cause of action against them, and that the demurrer to the evidence should have been sustained.

The claim of insufficiency is based mainly on the fact that the plaintiff pleaded that she was the owner and holder of a promissory note and only proved the assignment of a note previously lost. It is argued that an averment of the execution and existence of a note is not sustained by proof of a lost note. The execution of the note, which was set forth in the petition, was admitted by the defendants. The mortgage was assigned and delivered to the assignee, and it contained a copy of the note which corresponded with the copy set out in the petition; and the statute provides that "the assignment of any mortgage as herein provided shall carry with it the debt thereby secured": Gen. Stats. 1901, sec. 4238. There was abundant testimony that Ford was the owner of the note, but the question remains whether there could be a recovery in the absence of an averment that the note had been lost. The loss of the note is no part of the cause of action, and a statement of the loss is therefore not an essential allegation. The reason that loss or destruction of a note or other instrument is alleged in certain cases is to excuse the failure to give a copy of it in the pleadings or the failure to make profert of the instrument where it is required.

In *Sargent v. Steubenville & I. R. R. Co.*, 32 Ohio St. 449, the supreme court of Ohio held that "an action may be sus-

tained on a destroyed promissory note, and where a copy of the note is given with or made part of the petition the destruction of the note need not be averred in the petition." The same view was taken by the supreme court of Indiana, in *Cunningham v. Hoff*, 118 Ind. 263, 20 N. E. 756, in which it was held that, "where a copy of a note sued on is filed with the complaint ⁵⁹⁶ as an exhibit, no allegations in regard to the loss or destruction of the note are necessary to make the complaint good": Syllabus. The case of *Houy v. Gamel*, 26 Tex. Civ. App. 123, 62 S. W. 76, was an action to recover on notes which had been lost, and it was contended that proof of the loss and secondary evidence of execution and contents could not be received because allegations of loss were not contained in the petition. It was held that "it was not necessary in this character of suit to allege the notes as having been lost. If it were an equitable suit to establish the existence of lost notes merely, such averments would probably have been essential. But this was to recover judgment upon the notes, and a rule of evidence only was involved; and upon proof of the loss, secondary evidence concerning their execution and contents was admissible": Page 124. The same question was before the supreme court of Vermont, in the case of *Viles v. Moulton*, 11 Vt. 470, where it was said: "This was an action on note. The note was not produced in evidence, but the plaintiff endeavored to prove its loss and contents. The first objection which was raised on the part of the defendant was that there was no count in the declaration upon a lost note. We think that there is no necessity for such a count in any case. Whenever it becomes necessary to make a profert of an instrument, if it is lost, there must be an averment of the loss. But, in a declaration on a note, no profert is made. It is not usual, and not required in the courts of the United States, to declare specially on a lost note as lost": Page 474. See, also, *Renner v. Bank of Columbia*, 22 U. S. 581, 6 L. ed. 166; *Dormady v. State Bank of Illinois*, 3 Ill. 236; *Adams v. Baker*, 16 R. I. 1, 27 Am. St. Rep. 721, 11 Atl. 168; *Adams v. McCauley*, 4 Rob. 184; 13 Ency. of Pl. & Pr. 364.

To the claim that it was unfair for the plaintiff to set out a copy of the note as if she had possession of the original, and then at the trial present the copy of it with secondary evidence of its contents, it may be said that the execution of the instrument as it was ⁵⁹⁷ copied in the mortgage was

admitted. Then, again, the defendants could not have been misled or prejudiced on that account, as long prior to the trial depositions had been taken by both plaintiff and defendants with respect to the loss of the note, and the question was tried out substantially as if it had been pleaded.

Nor did the defendants suffer prejudice by the averment that the note had been indorsed and sold before maturity, where the only proof was of a sale after maturity and without indorsement. The plaintiff was not claiming the rights of an innocent holder, nor seeking to cut off the equities of the maker. Upon a like question, in *Bank of Commerce v. Schlegel*, 66 Kan. 509, 72 Pac. 210, Mr. Justice Mason remarked: "As plaintiff did not assert any rights as an innocent purchaser and did not claim to have purchased the note before maturity, the allegation of its indorsement was immaterial, and it was not necessary for plaintiff to prove it in order to establish its right to recover": Page 511.

When the plaintiff first rested her case the defendants demurred, and indicated that they would stand on their demurrer. The court remarked to the jury that it would be his duty to instruct them to find for the plaintiff. He suggested the appointment of a foreman, and requested the clerk to give him a blank verdict, when plaintiff's attorney asked and obtained leave to offer evidence of defects in defendants' tax deed, the execution of which had been admitted. There is a complaint that this was in effect an instruction to the jury to find against the defendants, and that it was never withdrawn from their consideration. The court indicated that as the case stood it would be his duty to instruct them to find for the plaintiff, and some steps were taken preparatory to the giving of such instruction. Before it was given, however, the case was reopened, testimony was introduced on the part of both plaintiff and defendants, and the case was submitted at length to the jury under full instructions by the court. 508 The jury could not have misunderstood the status of the case, nor been misled by the remark of the judge.

Testimony offered for the purpose of showing that the mortgage debt was satisfied and the mortgage discharged by the execution of a deed from the mortgagor was excluded by the court. No error was committed in its exclusion. Payment, satisfaction or settlement were not pleaded, and could not be proved under a general denial: *Stevens v. Thompson*, 5 Kan.

305; St. Louis etc. R. R. Co. v. Grove, 39 Kan. 731, 18 Pac. 958; Kansas Nat. Bank v. Quinton, 57 Kan. 750, 48 Pac. 20.

Nor was there any abuse of discretion in the ruling refusing the application of defendants to amend the answer and introduce the new issue of payment or satisfaction near the end of the trial.

The statute of limitation invoked by the defendants was not available to them, as they claimed under a tax deed and not under any title derived from the mortgagor: Ordway v. Cowles, 45 Kan. 447, 25 Pac. 862; Lincoln M. & Trust Co. v. Parker, 65 Kan. 819, 70 Pac. 892.

There was sufficient testimony to show that the tax deed of the defendants was defective and void, and while some other objections have been made to the proceedings and judgment we find nothing substantial in them, and no ground for reversal. The judgment is affirmed.

All the justices concurring.

For Authorities in support of the principal case, see the note to *Matthews v. Matthews*, 94 Am. St. Rep. 478, on actions on lost instruments. A court of equity has jurisdiction to entertain a suit for the recovery of the amount due upon a lost check, not negotiable for want of indorsement: *Moore v. Durnan*, 69 N. J. Eq. 828, 115 Am. St. Rep. 635.

FIRST NATIONAL BANK v. COMMERCIAL SAVINGS BANK.

[74 Kan. 606, 87 Pac. 746.]

BANKS AND BANKING—Acceptance of Check by Drawee.—A telegraphic inquiry, "Is J. F. Donald's check on you for \$350 good?" responded to by telegraph that, "J. F. Donald's check is good for the sum named," is not an absolute promise to pay, and does not constitute an unqualified acceptance of the check. (p. 344.)

BANKS AND BANKING—Acceptance of Check by Drawee.—The drawee of a bank check cannot be held liable upon a claimed contract of acceptance external to the bill, unless the language used clearly and unequivocally imports an absolute promise to pay. (p. 346.)

C. D. Walker, J. L. Berry and H. Elliston, for the plaintiff in error.

Jackson & Jackson, for the defendant in error.

607 BURCH, J. J. F. Donald, having funds on deposit with the First National Bank of Atchison, Kansas, drew a check upon it for \$350, payable to Maria C. Donald or bearer, which he delivered to the payee. The payee indorsed and delivered the check to C. B. Bennett, who in turn indorsed and delivered it to the Commercial Savings Bank of Adrian, Michigan. Donald stopped payment of the check before it was presented for payment, and the Michigan bank sued the Kansas bank for the face of the check and interest, claiming it had been accepted in writing, and that it had been purchased for value on the faith of such acceptance. The petition was framed upon the theory that an acceptance is disclosed by the following telegrams:

“Adrian, Mich., October 15, 1903.

“First National Bank, Atchison, Kan.:

“Is J. F. Donald's check on you \$350 good?

“COMMERCIAL SAVINGS BANK.”

“Atchison, Kan., October 15, 1903.

“Commercial Savings Bank, Adrian, Mich.:

“J. F. Donald's check is good for sum named.

“FIRST NATIONAL BANK.”

A demurrer to the petition was overruled, and an objection to the introduction of any evidence under the petition was likewise overruled. The case was tried before a jury and a demurrer to the plaintiff's evidence was overruled. The court properly reserved the interpretation of the telegrams to itself, but it instructed the jury as follows: “If the jury believe that plaintiff bank, on being requested to purchase J. F. Donald's check for \$350, made inquiry of defendant bank by telegraph as follows: ‘Is J. F. Donald's check on you \$350 good?’ and you further find that said bank on the same day by telegraph answered plaintiff bank's said inquiry as follows: ‘J. F. Donald's check is good for sum named,’ and then that plaintiff bank bought said check on the 608 faith of said telegram, or acceptance, and paid therefor a valuable consideration, then your verdict should be for the plaintiff, and against the defendant bank, for the full amount of said check, together with interest thereon from October 17, 1903, at the rate of six per cent per annum; but if you find the facts to be otherwise, your verdict should be for the defendant bank.”

A verdict was returned for the plaintiff, and the question is whether the trial court was correct in holding throughout the case that a contract of acceptance was made by the telegrams. Of course, there is no dispute that the transaction is governed by sections 547 and 548 of the General Statutes of 1901, which read as follows:

“No person within this state shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent.

“If such acceptance be written on paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, in faith thereof, shall have received the bill for a valuable consideration.”

In the case of *Shutt Imp. Co. v. Erwin*, 66 Kan. 261, 71 Pac. 521, which interprets section 547, the syllabus reads: “The drawee of a bill of exchange or an order to pay money is not liable in an action thereon by the holder until after he has accepted such bill or order in writing.”

And the syllabus of the case of *Eakin v. Citizens' State Bank*, 67 Kan. 338, 72 Pac. 874, is as follows: “A bank check is a bill of exchange within the meaning of section 548 of the General Statutes of 1901, providing that an acceptance of a bill of exchange written on a paper other than the bill ‘shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, in faith thereof, shall have received the bill for a valuable consideration.’ ”

⁶⁰⁰ Nor is there any dispute that the written acceptance contemplated by the statute may be made by telegrams: 7 Cyc. 765.

The order contained in a check is for payment in money instantly, upon demand. No presentation for acceptance and no acceptance is contemplated, as in the case of an ordinary bill of exchange. The bank is under no obligation to do other than pay, and the obligation to pay runs to the maker and not to the holder. If it refuse to pay when it has funds of the maker in its possession subject to check, the holder has no remedy against the bank. He must look to the maker.

When an ordinary bill of exchange is presented for acceptance, the drawee is under the positive duty of accepting or refusing to accept; and if acceptance be not plainly negatived by whatever he does, he will be bound as an acceptor, because acceptance is something contemplated by the

bill itself. A request upon a bank that it accept a check is a request for the creation of a legal relation between the holder and the bank wholly without and beyond the purview of the paper. If such relation be established, it imposes upon the bank a liability to a party to whom it was not before bound at all, and it converts the privilege of the bank to pay, if in funds, into an absolute and unconditional duty to pay, no matter what may be the state of the depositor's account. Anyone claiming to be the beneficiary of a contract of this kind, independent of, and collateral to the check, must clearly show that the bank intended to make it.

Neither law nor custom binds parties to the use of any set formula in arranging an acceptance. They may choose their own words. Brevity is not simply allowable—it is commendable; but in all cases there must be no doubt that an absolute promise to pay was made. If the transaction involve two writings, a proposition and a response, they should be construed together. The true principle governing the interpretation ⁶¹⁰ of communications like the telegrams between the parties to this suit was grasped and stated in the case of *Rees v. Warwick*, 2 Barn. & Ald. 113. In that case the drawer wrote the drawee, as follows: "Yesterday we valued upon you, favor W. Johnson & Co., two months for 100 £ which please to honor." The drawee replied: "Your bill 100 £ to W. Johnson & Co. shall have attention." It was held by Mr. Chief Justice Abbott that, to make a letter an acceptance, it ought to be in terms which admit of no doubt; that the phrase "shall have attention" is at least ambiguous; that it may mean the drawee would examine and inquire into the state of the drawer's account for the purpose of ascertaining whether or not the bill would be accepted; and that unless the words used import a clear and unequivocal acceptance no recovery may be had. Mr. Justice Holroyd said: "The very circumstance that it has been so often lamented that anything short of a written acceptance on the face of the bill should be held to make a party liable as acceptor shows the inconvenience that arises from the great uncertainty which is thereby introduced. In this case, the words contended to be an acceptance are that the bill 'shall meet attention.' The defendant does not say, as in *Wynne v. Raikes*, that the bill 'shall be paid or accepted,' but in fact only that he will attend to it. Consistently, then, with these words, it might depend on the state of the account

between them whether he would accept the bill or not": Page 116.

Tested by this rule, the defendant bank's telegram does not express an acceptance.

The inquiry indicates no clear intention to extract from the bank a new contract to pay, independent of its duty to Donald. It is entirely inconsistent with the expression of a simple desire for information relating to Donald's standing at the bank. It fairly means: "Is J. F. Donald's account with you sufficient to make his check for \$350 good?" The answer is strictly responsive ⁶¹¹ to the inquiry. It indicates no clear intention to make Donald's check good whenever presented and whatever the condition of his account. It is entirely consistent with the simple purpose to state Donald's standing at the bank on the day of the telegram. It fairly means: "Donald's account is now sufficient to meet a check for the sum named." The writings are not equal to the unambiguous and unequivocal "Will you pay?" and "We will pay." Other cases recognize the principle here applied. In the case of *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203, the inquiry was: "Are M. A. Walton's checks for \$2,000 good?" The answer was: "Yes, sir." (Page 201.) The court in denying that the acceptance was disclosed, said: "The bank is the agent of the drawer. Its duty is to pay his money as he directs. It owes no duty to the holder, except under the drawer's directions, until by virtue of those directions it assumes some obligation to the holder. Up to that time the latest order from the drawer governs. But after the bank has paid the check, or placed itself under an obligation to pay it, the drawer's power of revocation is ended. This obligation may be incurred by acceptance. It is sometimes said that the legal effect of the acceptance is to place the holder of the check in the position of a depositor. By the acceptance a new and specific engagement is entered into by the bank, which is to unconditionally pay the sum named to the legal holder of the check. The acceptance or certification is sometimes evidenced by writing the word 'good' on the check by the authorized officer or agent of the bank; but no particular mode or form is necessary, and it is generally held that a verbal acceptance is sufficient. But whatever the mode or form employed, there must be enough to indicate the acceptance of the particular check.

“It is manifest there was no acceptance or certification of the checks in question in this case. The telegraphic correspondence between the bank and Kahn’s agent amounted to no more than an assurance that valid checks to the amount stated, drawn by Walton, or that might be drawn by him, were then good. No ⁶¹² particular checks were mentioned in the inquiry, nor any intimation given that the inquirer had received, or was about to receive, such checks; nor had the bank any means of identifying the checks to which the inquiry related. Its telegram, therefore, did not commit the bank to the payment of any particular check. At most, it was information that Walton had, at its date, money on deposit to the amount stated, subject to check”: Page 206.

In the case of *Cook v. Baldwin*, 120 Mass. 317, 21 Am. Rep. 517, it was held that the words “I take notice of the above,” written upon a bill of exchange and signed by the drawee, do not of themselves necessarily import an acceptance. The court said: “The words written upon the bill are a recognition only that the bill had been presented for acceptance; they are not inconsistent with a positive refusal to accept or to become bound to pay the plaintiffs”: Page 319.

In the case of *Myers v. Union Nat. Bank*, 27 Ill. App. 254, the inquiry was “Will drafts for thirty-eight hundred dollars, made by J. R. Snyder on you, be paid if presented Monday?” The answer was: “Drafts named are good now.” (Page 255.) The court said: “There is a distinct implication in the words ‘Drafts named are good now,’ that the bank would not undertake to answer for the state of Snyder’s account beyond the moment when its telegram was sent. . . . An acceptance is a contract, and does not differ from other contracts in the essential requirement of a meeting of minds. A bank is not bound to accept by telegram the checks or drafts of its depositors, although in possession of funds to pay. Its duty in such cases is to accept a draft, or pay a check, only on presentment. One relying on a telegram as an acceptance should see to it that the language used will, at least, fairly bear the meaning”: Page 261.

In the case of *Bank of Springfield v. First Nat. Bank*, 30 Mo. App. 271, a check was offered in part payment ⁶¹³ of a draft. The financial standing of the maker of the check was not good, and the bank holding the draft telephoned the drawee of the check, asking if it was good. The response was that the check was “all right.” The maker’s account was

good for the check on that day and the next, but it was not presented until the second day after the telephone communication, and then after the maker had failed. The holder sued the drawee, claiming a parol certification. In the opinion of the court several reasons were given why the plaintiff should not succeed, but the controlling one appears in the syllabus, which reads thus: "A parol representation by the bank upon which a check is drawn, that the check is good, is not equivalent to a certification, and does not bind the bank to pay it whenever presented, until barred by limitation; nor does it release the holder from the duty of proper diligence in presentment for payment. It binds the bank to nothing more than that the statement was true at the time when it was made."

These authorities are sufficient to illustrate the rule that the drawee of a bank check cannot be held liable upon a claimed contract of acceptance external to the bill, unless the language used clearly and unequivocally import an absolute promise to pay.

The decision in the case of *Garrettson v. North Atchison Bank*, 39 Fed. 163, 7 L. R. A. 428, relied upon by counsel for plaintiff, was affirmed by the circuit court of appeals upon the identical principle discussed above. The telegrams in that case were as follows: "Will you pay James Tate's check on you, twenty-two thousand dollars? Answer." "James Tate is good. Send on your paper." The circuit court of appeals said: "The question put to the bank was wholly free from ambiguity. It was clear, direct, and pointed: 'Will you pay James Tate's check on you, twenty-two thousand dollars? Answer.' There can be no doubt that it was Streeter's purpose, in sending this telegram, to ascertain whether the bank would bind itself to pay the ⁶¹⁴ check in case he took it in payment for the cattle to be delivered to Tate. Can there be any doubt that the bank must have understood the purpose and meaning of the dispatch thus addressed to it? The bank was engaged in the business of receiving money on deposit, and paying it out on checks drawn by its depositors. No other meaning could be given to the telegram by the bank than that James Tate's check on the bank, for \$22,000, had been offered to Streeter, and, before he accepted it, he wished to know whether it would be paid on presentation. So far, therefore, as the meaning of the telegram sent to the bank is persuasive in determining the contract of the parties, it must be held

that its purpose was to procure an absolute promise of payment from the bank, before the same could be received in payment for the cattle contracted to be sold to Tate.

“It cannot be questioned, and it is practically admitted by counsel for the bank, that if the answer had been, ‘The bank will pay Tate’s check for twenty-two thousand dollars on presentation,’ there would be no doubt that thereby the bank would have been bound absolutely for the payment of the check. Can any other meaning be fairly given to the words actually used by the bank in answering the question put to it? These are, ‘James Tate is good; send on your paper.’ Counsel for plaintiff in error claim that the answer should only be construed to be a statement that Tate was good for the amount named, and cannot be construed to be a promise to pay the check. The question put to the bank, and to which an answer was requested, was not whether Tate was good, but whether the bank would pay his check for a given sum. It cannot be supposed that the bank intended to return an ambiguous answer for the purpose of misleading the party asking the question, and therefore, if the answer had been limited to the words, ‘Tate is good,’ there would be ground for holding that the bank thereby intended an affirmative answer to the categorical question put to it; but all doubt is put at rest by the remaining words of the answer, to wit, ‘Send on your paper.’ These words invited action on the part of the person to whom they were addressed. They are not merely an expression of an opinion. Read in connection with the message sent by Streeter, and which they ⁶¹⁵ were intended to answer, the meaning thereof is, ‘Send on your check on Tate, and we will pay it’ ”: *North Atchison Bank v. Garrettson*, 51 Fed. 168, 2 C. C. A. 145.

There is no occasion to consider what words indorsed upon a check and signed by the drawee will amount to a certification when the check is put into circulation upon the credit of the indorsement.

Donald, upon his own request, became a party to the action. The court instructed the jury to find in his favor if they found in favor of the defendant bank, and under direction of the court a verdict was returned for Donald, upon which judgment was rendered. Manifestly, this judgment cannot now stand. It is therefore reversed, and the cause as to Donald remanded for further proceedings. The judgment against the

defendant bank is reversed, and the cause remanded, with instruction to sustain its demurrer to the petition.

All the justices concurring.

ACCEPTANCE OF CHECK BY BANK, WHAT AMOUNTS TO.

Although the term "acceptance of a check by a bank" is loosely used in a number of cases, it seems plain that there can be no such thing as an "acceptance" of a check by a bank in the strict commercial sense of the term. The word "acceptance" in commercial law applies rather to bills of exchange than to checks, because a check, it is well settled, is an order upon a bank, purporting to be drawn upon a deposit of funds, for the payment, at all events, of a certain sum of money to a certain person therein named or to his order, or to bearer, instantly on demand. True, a bank may certify a check as good, and thus become absolutely liable for its payment, or, we apprehend, it may be an unequivocal promise in writing make itself liable in any event to pay the check upon demand, but this is not an "acceptance" of the check in the true sense of that term. As has been truly said, "A check being payable immediately and on demand, the holder can only present it for payment, and the bank can fulfill its duty to its depositor only by paying the amount demanded. In other words, the holder has no right to demand from the bank anything but payment of the check, and the bank has no right, as against the drawer, to do anything else but pay it. It follows that there is no such thing as acceptance of checks in the ordinary sense of the term, for acceptance ordinarily implies that drawer requests the drawee to pay the amount at a future day, and the drawee 'accepts' to do so, thereby becoming the principal debtor, and the drawer becoming his surety; Daniel on Negotiable Instruments, sec. 1601"; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403, 27 N. E. 533, 12 L. R. A. 492. The following cases show conclusively that the word "acceptance" should not be applied to checks: "The distinguishing characteristics of checks as contradistinguished from bills of exchange are, that they are always drawn on a bank or banker; that they are payable immediately on presentment without the allowance of any days of grace; that they are never presentable for mere acceptance, but only for payment": *In re Brown*, 2 Story, 502, quoted with approval in *Culter v. Reynolds*, 64 Ill. 321; *Champion v. Gordon*, 70 Pa. 474, 10 Am. Rep. 681. Checks are not payable on time, and are therefore not presented for or subject to acceptance, and in this particular they differ from bills of exchange: *Farmers' etc. Bank v. Butchers' etc. Bank*, 28 N. Y. 425; *Hawley v. Jettie*, 10 Or. 31, 45 Am. Rep. 129.

"By the law-merchant of this country the certificate of the bank that the check is good is equivalent to acceptance; it implies that the

check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of a depositor, or any other obligation it can assume": *First Nat. Bank v. Currie*, 147 Mich. 72, 110 N. W. 499, post, p. 537.

With these preliminary remarks showing that the response made by a bank to an inquiry as to whether a check is good or will be paid amounts or does not amount to a certification, rather than an "acceptance," depending on the circumstances, we shall now discuss those cases which involve that question.

A parol representation by a bank upon which a check is drawn that the check is good is not equivalent to a certification, and does not bind the bank to pay it whenever presented until barred by limitation, nor does it release the holder from the duty of proper diligence in presentment for payment. It binds the bank to nothing more than that the statement was true at the time when it was made: *Bank of Springfield v. First Nat. Bank*, 30 Mo. App. 271.

A bank check, being an order on a bank by the drawer to pay his money as therein directed, is revocable by him before its presentation for payment, unless the bank on which it is drawn has certified it or otherwise become committed to its payment, and while an affirmative answer by the bank to a general inquiry whether checks of a person named for a specified amount are good is information that such person has on deposit, subject to check, money to that amount, it does not constitute a certification of, or otherwise create an obligation on the bank to pay, checks which the inquirer may then hold: *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203. In this case it was said that "a check, being simply a written order of a depositor to his banker to make a certain payment out of his funds, is executory, and, of course, revocable at any time before the bank has paid it or committed itself to its payment. It operates, it is true, to an assignment of the fund on which it is drawn, pro tanto, and binds the bank to its payment out of the fund when presented, unless revoked; but it is not of itself payment of the debt for which it is drawn, unless it be so agreed between the parties. Ordinarily, it is only a means of payment, and the debt is not extinguished unless and until the check be paid or the holder be guilty of laches which may operate as a discharge of the drawee. The bank is the agent of the drawer. Its duty is to pay his money as he directs. It owes no duty to the holder, except under the drawer's directions, until by virtue of those directions it assumes some obligation to the holder. Up to that time the latest order from the drawer governs. But after the bank has paid the check, or placed itself under an obligation to pay it, the drawer's power of revocation is ended. This obligation may be in-

curred by acceptance. It is sometimes said that the legal effect of the acceptance is to place the holder of the check in the position of a depositor. By the acceptance a new and specific engagement is entered into by the bank, which is to unconditionally pay the sum named to the legal holder of the check. The acceptance or certification is sometimes evidenced by writing the word 'good' on the check by the authorized officer or agent of the bank, but no particular mode or form is necessary and it is generally held that a verbal acceptance is sufficient. But whatever the mode or form employed, there must be enough to indicate the acceptance of the particular check." It is manifest there was no acceptance or certification of the checks in question in this case. The telegraphic correspondence between the bank and Kahn's agent amounted to no more than an assurance that valid checks to the amount stated, drawn by Walton, or that might be drawn by him, were then good. No particular checks were mentioned in the inquiry, nor any intimation given that the inquirer had received, or was about to receive, such checks, nor had the bank any means of identifying the checks to which the inquiry related. Its telegram, therefore, did not commit the bank to the payment of any particular check. At most it was information that Walton had, at its date, money on deposit to the amount stated, subject to check: *Espy v. First Nat. Bank*, 18 Wall. 604, 21 L. R. A. 947. If, therefore, before the checks were presented for payment, and before they were certified or accepted by the bank, or it otherwise became committed to their payment, Walton revoked them, and notified the bank not to pay them, as he claims, and as the district court found he did, his defensive remedy at law would appear to be adequate: *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203.

A bank is not bound to accept by telegram the checks or drafts of its depositors, although in possession of funds to pay. Its duty in such cases is to accept a draft, or pay a check only on presentment. One relying on a telegram as an acceptance or certification should see to it that the language used will at least fairly bear that meaning. Hence, an inquiry by telegram directed to a certain bank asking if certain checks drawn by a certain person would "be paid if presented Monday," to which a reply was made, "Drafts named are good now," is not such an acceptance or certification by the bank as will bind it to pay such drafts on presentation: *Meyers v. Union Nat. Bank*, 27 Ill. App. 254. A letter stating, "We are ready to pay your sight drafts on us which you advise us as having been drawn against particularly to be described shipments," is not an unconditional promise to accept such drafts, and, considered as a general letter of credit, the letter amounts simply to a contract to pay advances made in conformity with the conditions prescribed: *Germania Nat. Bank v. Taaks*, 101 N. Y. 442, 5 N. E. 76.

A draft may be accepted by an unconditional promise in writing describing it in terms not to be mistaken, but a letter agreeing to

pay drafts of G. for cattle or hogs made on the day of shipment, not to exceed two carloads at a time, is not sufficiently definite to constitute an acceptance within the rule: *Bank of Atchison Co. v. Bohart Commission Co.*, 84 Mo. App. 421. "No amounts are named, nor is there any mode stated, whereby such sums may be ascertained. The cost of two carloads of cattle or hogs is certainly an indefinite expression. There is no particularizing of either the stock or the cost. The letter is much too general to be regarded as an actual acceptance of a particular bill": *Bank of Atchison Co. v. Bohart Commission Co.*, 84 Mo. App. 421.

In a number of the states a statute expressly provides that an acceptance of a bill of exchange written on paper other than the bill shall not bind the acceptor except in favor of a person to whom such acceptance shall have been shown, and who in faith thereof shall have received the bill for a valuable consideration, and it is generally maintained that a bank check is a bill of exchange within the meaning of such statute: *Eakin v. Citizens' State Bank*, 67 Kan. 338, 72 Pac. 874; *Risley v. Phoenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Baltimore etc. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837; *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

Any unconditional promise by a bank to pay a certain check then drawn, or thereafter to be drawn, makes the bank liable thereon to the person who holds and presents the check, having taken it with knowledge of and in reliance upon such promise. Such promise may be made verbally or in writing, by letter, telegram or otherwise. Thus, a telegram unconditionally agreeing to accept a person's draft or check for a certain sum "for stock" is not a conditional contract, but an absolute undertaking to accept and pay it, and a person discounting such paper on the faith of such telegram is entitled to recover the amount from the bank thus agreeing to accept. In such case, it is the duty of the latter to express clearly the condition of its acceptance, if it is desired to make it conditional, and the burden is upon him to show it, and not upon the holder of the check: *Coffman v. Campbell*, 87 Ill. 98. While a bank is not liable on its promise to pay a check unless the promise comes to the knowledge of the payee and he takes the check upon the faith thereof, yet a promise by a bank to pay a check drawn by a person for the purchase of a cargo of corn communicated to the seller by the purchaser and by the bank, and relied upon by the seller in taking the purchaser's check, sufficiently identifies the check, and will support an action for the breach of the promise to accept and pay it: *Nelson v. First Nat. Bank*, 48 Ill. 36, 95 Am. Dec. 510.

An unconditional promise by telegram to pay a certain draft or check constitutes an acceptance which is binding on the bank making such promise. No particular form is necessary to such acceptance; it may be expressed in words, either verbal or written, and

it may be made before the paper is drawn, or afterward, and it may be made by telegram: *In re Armstrong*, 41 Fed. 381; *Johnson v. Blake-more*, 28 La. Ann. 140.

In *Garrettson v. North Atchison Bank*, 39 Fed. 163, 7 L. R. A. 428, it appeared that one "T.," having purchased certain cattle, offered his check for twenty-two thousand dollars in payment. The seller refused to accept or part with the cattle until assured that the check would be paid, and therefore telegraphed the drawee asking if it would pay such check. The drawee answered: "T. is good. Send on your paper," and it was decided that this constituted a contract to pay the check on presentation, and that the drawee bank was liable therefor. This case was reaffirmed in *Garrettson v. North Atchison Bank*, 47 Fed. 867, 51 Fed. 168, where it was further held that the bank having agreed to accept and pay such check, it cannot legally refuse payment on the ground that the check, when presented, concludes with the words "with exchange," no place of exchange being mentioned, such words being mere surplusage, and of no effect.

A check thus accepted possesses all the quality of commercial paper, passes by indorsement, and confers upon the indorsee the right of action, as upon any other chose in action: *Garrettson v. North Atchison Bank*, 39 Fed. 163, 7 L. R. A. 428; citing *Whilden v. Merchants' etc. Bank*, 64 Ala. 1, 38 Am. Rep. 1; *Central Sav. Bank v. Richards*, 109 Mass. 413; *Freund v. Importers' etc. Bank*, 76 N. Y. 352. And an unconditional promise in writing to accept a draft or check is a sufficient acceptance thereof in favor of every person who, upon the faith thereof, has taken the paper for a good consideration, and a promise by the drawee to the effect that the draft or check will be honored amounts to an acceptance and renders such drawee liable in an action thereon by an assignee or indorsee thereof for value: *James v. Lyons Co.*, 134 Cal. 189, 66 Pac. 210; reaffirmed, 147 Cal. 69, 81 Pac. 275.

A binding promise to accept a nonexisting check, to constitute a valid acceptance, need not describe it by its date and amount. It may be described in such mode merely that there can be no possible doubt as to the application of the promise to the check to be drawn, and a description of sufficient certainty could thus be made to apply to a series of checks, as well as to a single one: *Nelson v. First Nat. Bank*, 48 Ill. 36, 95 Am. Dec. 510.

FIRST NATIONAL BANK v. LIGHTNER.

[74 Kan. 736, 88 Pac. 59.]

BILLS AND NOTES—Negotiable Instruments—Unconditional Payment.—An order reading, "Hutchinson, Kan., August 10, 1903. G. W. Lightner, Offerle, Kan.: Dear Sir.—Pay to the order of the First National Bank of Hutchinson, Kansas, \$1500 on account of contract between you and the Snyder Planing-mill Company. The Snyder Planing-mill Company, Per J. F. Donnell, Treasurer; accepted, G. W. Lightner," is a negotiable bill of exchange, payable absolutely. The words "on account of contract," etc., are not a direction to charge a particular fund, and merely indicate the fund to which the drawee is to look for reimbursement. (p. 359.)

Fairchild & Lewis and E. C. Cole, for the plaintiff in error.

F. D. Smith, for the defendant in error.

736 PORTER, J. The First National Bank of Hutchinson brought this action against George W. Lightner. Two causes of action are declared upon in the petition: The first, upon a check for \$1,000, drawn in favor of the bank by defendant; the second, upon an order for \$1,500, drawn by the Snyder Planing-mill Company upon the bank, and accepted by defendant. It was alleged that the \$1,000 check was given by defendant to take up an order for that amount which was drawn upon the bank by the planing-mill company about the same time the other order was drawn, and which likewise had been accepted by defendant; that both orders and the check were acquired by the bank in the regular course of business for value; and that payment had been refused upon both the check and the order.

737 The answer admitted the acceptance of the orders and the making and delivery of the check, but alleged that the orders were non-negotiable and were nothing more than a mere assignment of the rights of the Snyder Planing-mill Company to payment for the erection of a barn when the same should be completed according to the terms of a written contract made by the defendant with the company; that soon after the orders were accepted the planing-mill company became, and still was, insolvent, and had failed to complete its contract; that defendant had been compelled to complete the barn himself, at considerable loss; and admitted a balance due upon the contract very much less than the amount of the two orders, which defendant averred a willingness to pay.

The cause was tried to the court without a jury. The court made the following special findings of fact and conclusions of law:

"FINDINGS OF FACT.

"That the Snyder Planing-mill Company entered into a contract with the defendant, Lightner, for the erection of a certain barn at the contract price of \$3500. That prior to the completion of said barn, and on the 28th day of September, 1903, the Snyder Planing-mill Company was duly adjudicated bankrupt, and the defendant, Lightner, was compelled to and did complete the barn.

"That prior to the adjudication of the Snyder Planing-mill Company as bankrupt, at the request of said company, Lightner accepted two orders, one for \$1000 and one for \$1500, which said orders and acceptances were identical, with the exception of the amounts and dates. The one for \$1500 reads as follows:

" 'Hutchinson, Kan., August 10, 1903.

" 'G. W. Lightner, Offerle, Kan.:

" 'Dear sir.—Pay to the order of the First National Bank of Hutchinson, Kansas, \$1500, on account of contract between you and the Snyder Planing-mill Company.

" 'THE SNYDER PLANING-MILL COMPANY,

" 'Per J. F. DONNELL, Treasurer.

" 'Accepted: G. W. LIGHTNER.'

738 "Said two orders, so accepted, were by the Snyder Planing-mill Company hypothecated with the First National Bank of Hutchinson, Kansas, to secure two certain demand notes drawing ten per cent interest and of even amounts with said orders; the \$1000 order being hypothecated about August 22, 1903, and the \$1500 order on or about August 11, 1903. The proceeds of said notes were at said dates duly received from said bank and used by the Snyder Planing-mill Company. Said notes are still due and unpaid.

"That said orders were so accepted by Lightner on or about August 10, 1903, and that about September 30th, Lightner took up the \$1000 order by giving therefor his check for \$1000 to the cashier of plaintiff, which was as follows:

" 'Kinsley, Kan., September 30, 1903.

" 'The National Bank of Kinsley:

" 'Pay to E. W. Eagan, cashier, or order, \$1000. One thousand dollars.

" 'GEORGE W. LIGHTNER.'

“That said Lightner stopped payment on said check prior to its presentation, and no part thereof has been paid, nor has any part of the \$1500 order been paid. That prior to the giving of the two orders, Lightner paid the Snyder Planing-mill Company \$1000 upon said contract, and that he was compelled to expend \$1624.04 to complete the barn. That there was a balance due and unpaid on said contract of \$875.-96, when this action was commenced.”

“CONCLUSIONS OF LAW.

“(1) That said orders were non-negotiable and were subject to the same defenses in the hands of the First National Bank of Hutchinson, Kansas, as though they had remained in the hands of the Snyder Planing-mill Company.

“(2) That plaintiff is entitled to judgment in this action in the sum of \$970, with interest from this date, at six per cent. per annum, and for costs.

“CHARLES E. LOBDELL, Judge.”

Plaintiff brings the cause here upon a transcript, and alleges error in the conclusions of law upon which the judgment is based and error in denying the motion for a new trial.

⁷³⁹ The main controversy is whether the orders given by the planing-mill company to the bank and accepted by defendant are negotiable instruments. It is true that no specific time of payment is mentioned, but that does not affect their validity as such instruments; and, where no date is mentioned, they are payable on demand: 4 Am. & Eng. Ency. of Law, 133, and note 3; *Douglass v. Sargent*, 32 Kan. 413, 4 Pac. 861. Each of them, therefore, possesses all the essential elements of a bill of exchange, unless the words “on account of contract between you and the Snyder Planing-mill Company” make them payable out of a particular fund, and conditionally, so that the acceptance is thereby qualified.

The law is well settled that a bill or note is not negotiable if made payable out of a particular fund: 1 *Daniel on Negotiable Instruments*, 5th ed., sec. 50; *White v. Cushing*, 88 Me. 339, 51 Am. St. Rep. 402, 34 Atl. 164, 32 L. R. A. 590. But a distinction is recognized where the instrument is simply chargeable to a particular account. In such a case it is beyond question negotiable; payment is not made to depend upon the sufficiency of the fund mentioned, and it is mentioned only for the purpose of informing the drawee as to his means of reimbursement: 1 *Daniel on Negotiable Instruments*, 5th ed., sec.

51; Tiedeman on Bills and Notes, sec. 20. In *Ridgeley Nat. Bank v. Patton*, 109 Ill. 479, it was said: "A bill or note, without affecting its character as such, may state the transaction out of which it arose, or the consideration for which it was given": Page 484.

"So, also, the insertion into a bill or note of memoranda explaining the nature of the business or debt ⁷⁴⁰ for which the instrument is given will not make it non-negotiable, for such a memorandum does not make the payment conditional": Tiedeman on Commercial Paper, sec. 26.

The test in every case is said to be, "Does the instrument carry the general personal credit of the drawer or maker, or only the credit of a particular fund?" 4 Am. & Eng. Ency. of Law, 89. A promise to pay a certain sum "out of my next quarter's mail pay; which becomes due January 1, 1883," was held, in *Nichols v. Ruggles*, 76 Me. 25, to be an absolute promise to pay a certain sum of money. In *Haussoullier v. Hartsinck*, 7 Durn. & E. 733, it was held that an instrument promising to pay a certain sum, "being a portion of a value as under deposited in security for the payment hereof," was a promissory note payable at all events. In *Pierson v. Dunlop*, 2 Cowp. 571, an order which was to be charged "to freight" was held negotiable. A note expressed to be in payment of certain tracts of land was held negotiable: *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855. Likewise a note which stated that it was given in consideration of certain personal property, the title to which was not to pass unless the note was paid: *Chicago Railway E. Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. Rep. 999, 34 L. ed. 349. This court held, in *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337, 60 Pac. 327, 49 L. R. A. 190: "A note for the payment of a certain sum at a fixed date is not rendered non-negotiable by a stipulation that upon default in the payment of interest the whole amount shall become due at the option of the holder and then draw a greater rate of interest."

In *Corbett v. Clark*, 45 Wis. 403, 30 Am. Rep. 763, an order to pay a certain sum "and take the same out of our share of the grain," referring to grain harvested or growing on certain farms, accepted by the drawee, was said to be a valid bill of exchange, and the order and acceptance absolute, the words above ⁷⁴¹ quoted merely indicating the means of disbursement. In *Redman v. Adams*, 51 Me. 429, a bill directing the drawee to charge the amount against the drawer's share of fish caught on

a certain schooner was held valid and negotiable. One of the leading cases is *Macleed v. Snee*, 2 Strange, 762. There a bill of exchange was dated May 25th, for the payment of a certain sum one month after date, "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance." This was held a negotiable bill of exchange. In *Spurgin v. McPheeters*, 42 Ind. 527, an instrument in the following form was said to possess all the requisites of a bill of exchange:

"Greencastle, Ind., August 22, 1870.

"Mr. D. M. Spurgin:

"Sir—Please pay to Jesse McPheeters, or order, the sum of one hundred and nineteen dollars on said bill of 1¾-inch lumber, and oblige the firm of

"GEO. W. HINTON & CO."

In *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 50 Am. Rep. 316, the drafts or bills of exchange were in the ordinary form, except that they contained the direction to "charge the same to account of 250 bbls. meal ex schooner *Aurora Borealis*." The court said: "This direction to charge the amount of the bills to a particular account, we think, does not make them payable conditionally, or out of a particular fund; they are still payable absolutely, and are negotiable, and do not constitute an assignment of a particular fund, or of a part of a particular fund: *Macleed v. Snee*, 2 Strange, 762; *Redman v. Adams*, 51 Me. 429; *Corbett v. Clark*, 45 Wis. 403, 30 Am. Rep. 763; *Coursin v. Ledlie's Admr.*, 31 Pac. 506; *Spurgin v. McPheeters*, 42 Ind. 527."

The rule with regard to words which refer to the consideration is well stated in *Siegel v. Chicago Trust etc. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 23 N. E. 417, 7 L. R. A. 537, as follows: "The mere fact that the consideration for which a promissory note is given is recited in it, although it ⁷⁴² may appear thereby that it was given for or in consideration of an executory contract, or promise on the part of the payee, will not destroy the negotiability of the note, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid."

The following authorities are also in point: *Matthews v. Crosby*, 56 N. H. 21; *Shepard v. Abbott*, 179 Mass. 300, 60 N. E. 782; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737, 5 N. E. 452; *Hillstrom v. Anderson*, 46 Minn. 382,

49 N. W. 187; *Bank of Kentucky v. Sanders*, 3 A. K. Marsh. 184, 13 Am. Dec. 149; 4 Am. & Eng. Ency. of Law, 89; 7 Cyc. 580.

Section 10 of our negotiable instruments law, which is merely declaratory of the common law upon the subject, reads as follows:

"When promise is unconditional, An unqualified order or promise to pay is unconditional, within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument; but an order or promise to pay out of a particular fund is not unconditional": Laws 1905, c. 310, sec. 10.

Plaintiff and defendant agree upon the abstract proposition of law involved in the controversy. Counsel for defendant concedes that an instrument, negotiable in itself, is not changed in character or rendered non-negotiable "by a recital of the consideration of a direction as to how the drawee shall reimburse himself"; but insists that the insertion of the words "on account of" has the same effect as the words "out of the proceeds of." The controversy is thus narrowed down to whether the words "on account of contract between you and the Snyder Planing-mill Company" amount to a direction to pay out of a particular fund, or, on the other hand, are to be considered as simply ⁷⁴³ indicating the fund from which the drawee, Lightner, might reimburse himself. Many of the cases attach but little importance to the words "account of," and give the same effect to them as to the words "out of": 7 Cyc. 579.

In the case of *Pitman v. Breckenridge & Crawford*, 3 Gratt. 127, cited by the defendant, the phrase "on account of brick work done" on a certain building was held to be a direction to pay out of a particular fund. The case itself is of little value as an authority; it cites no cases, gives no reason, and simply holds the bill non-negotiable. The language "and charge the same to our account for labor and materials performed and furnished," in *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515, was held to be ambiguous, and other circumstances were considered as controlling. The bill was held not negotiable. The following order was held not negotiable, in *Conroy v. Ferree*, 68 Minn. 325, 71 N. W. 383, but the opinion

merely states that the order is drawn upon a special fund, without any discussion of the reasons:

“Starbuck, Minn., September 14, 1895.

“T. E. Thompson and C. L. Brevig:”

“Pay to the order of A. G. Englund one hundred fifty dollars (\$150) on earnings for the thrashing season of 1895, whatever they may be, and charge to the account of

“A. H. FERREE.

“\$150. Accepted September 14, 1895.

“By C. L. BREVIG.”

We are of the opinion that these orders cannot be construed as drawn upon a particular fund. Beyond question, there are many authorities which hold similar expressions to indicate an intention to charge a particular fund: See *Banbury v. Lisset*, 2 Strange, 1211; *Averett's Admr. v. Booker*, 15 Gratt. 163, 76 Am. Dec. 203; *Rice v. Porter's Admrs.*, 16 N. J. L. 440; 7 Cyc. 578. The weight of authority and reason supports the proposition that the ⁷⁴⁴ words amount to no more than an indication of the fund from which the drawee is to reimburse himself. The words used are substantially the same as though the orders read “and charge to account of contract with Snyder Planing-mill Company,” or “credit to account of contract,” etc. The \$1,000 check we consider in the same light as the order for which it was substituted.

Defendant in error argues that certain collateral circumstances appearing in the evidence must be taken into consideration; among other things, the fact that the bank held these orders for a time after their execution as indicating the intention with which the orders were taken. It is argued that, there being an ambiguity in the language, we must consider the construction placed upon these orders by the parties themselves. This case is here upon a transcript which contains none of the evidence, but merely the pleadings, findings of fact and of law, the judgment, and motion for a new trial. Had the trial court rested the decision upon the existence of these outside matters, the findings of fact, which are very complete, would doubtless have referred to them. The conclusions of law are so framed as to leave no doubt that the court held the instruments to be non-negotiable on account of the language used in the instruments themselves. In our view they were negotiable, and the language, moreover, not even ambiguous.

It follows that defendant was not entitled to recoup his damages for the failure to complete the barn; and the findings of the court, therefore, require a judgment for plaintiff for the amount due upon the order and the \$1,000 check. The cause is therefore reversed and remanded, with directions to enter judgment in favor of the plaintiff.

All the justices concurring.

The Negotiable Character of a promissory note is not affected by a statement in the instrument of the consideration upon which it is founded, or of the object for which the money is to be expended: Beatty v. Western College, 177 Ill. 280, 69 Am. St. Rep. 242; Siegel etc. Co. v. Chicago etc. Sav. Bank, 131 Ill. 569, 19 Am. St. Rep. 51. It may be otherwise, however, if the consideration is contingent: Jennings v. First Nat. Bank, 13 Colo. 417, 16 Am. St. Rep. 210.

An Order upon a savings bank for a certain sum of money, made chargeable to the drawer's account, but with the printed words, "the bank-book of the depositor must accompany this order," upon the face of the order, below the signature of the drawer, is not a negotiable instrument: White v. Cushing, 88 Me. 339, 51 Am. St. Rep. 402.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

GARNER v. FREEMAN.

[118 La. 184, 42 South. 767.]

APPEAL—Agreed Statement of Facts.—If a case is submitted on an agreed statement of facts, no point of law can be examined not arising on the facts stated, nor can the allegation of any fact, not found in such statement, receive attention. (pp. 362, 363.)

HOMESTEADS—Exemptions.—A husband claiming a homestead exemption is not required as a condition precedent to show that his wife does not own property exceeding a certain amount in value. (p. 363.)

HOMESTEAD.—Exemption Laws Must be Construed with reference to the condition of things existing at the date of the seizure. (p. 364.)

HOMESTEADS—Exemptions—Abandonment.—If a homestead claimant, who is the head of a family, has not voluntarily abandoned his possession, his incarceration in the penitentiary does not deprive him of his right to claim the homestead as exempt. (p. 364.)

HOMESTEADS—Exemptions—Head of Family.—A homestead claimant, having a wife and three minor children, is entitled to a homestead exemption, although they are not living with him at the time of the seizure and some of them may have been earning their own support. (pp. 364, 365.)

APPEAL—Amendment of Judgment.—A judgment as between coappellees alone cannot be disturbed or amended on appeal. (p. 365.)

W. A. Wilkinson, for the appellants.

Cunningham & Smith, W. T. Cunningham and S. Wahusley, for the appellees.

¹⁸⁵ LAND, J. Plaintiff enjoined the seizure and sale of certain personal property as exempt under the homestead and exemption laws of this state. The answer averred that plaintiff was in the penitentiary, where he ¹⁸⁶ had recently

begun to serve a sentence of five years; that he was not the head of a family, and had no one depending on him for support; and that he was not in a situation to avail himself of the homestead and exemption laws.

The case was tried on an agreed statement of facts, and there was judgment in favor of plaintiff, maintaining his claim of exemption. Defendant has appealed.

Plaintiff was the owner of the property seized, and was in possession of said property as owner at date of seizure. He had a wife and three minor children. He and his wife had been living apart for some fifteen months, and two of the children lived with their mother. The third child lived with her father up to May, 1905, when she went to live with her mother at Shreveport, and the said minor has ever since continued to reside with her mother. Ever since November 15, 1905, the mother and her three children had been residing on the Cunningham plantation in the parish of Natchitoches. The father had lived for three years on the Hollingsworth plantation in the same parish, and one of his daughters had lived with him until May, 1905, as stated above. The son, nineteen years of age, from time to time stayed with his father while working out on public and other works. Plaintiff's wife, from the time of her separation from her husband, washed and cooked in Shreveport until she moved on the Cunningham place as above stated. Plaintiff was in jail at Natchitoches from June 1, 1905, until he was taken to the penitentiary on November 6, 1905. Plaintiff was a farmer, and raised a crop of cotton, corn, and hay on the Hollingsworth plantation during the year 1905. These are substantially the facts disclosed by the statement of facts agreed upon by counsel, and on which the issues in the case were submitted to the court.

In this court, however, it is argued by counsel ¹⁸⁷ for defendants that plaintiff cannot maintain his homestead exemption without showing that his wife does not own property of the value of two thousand dollars. No such issue was raised by the pleadings or is covered by the statement of facts. The admission therein that the wife "washed and cooked" for a living indicates that she was without means or property of any value, and the silence of the statement on the subject shows that it was not considered as an issue in the case. It is to be presumed that all the relevant facts were settled by the agreement. In *Halsey v. Voorhies*, 7 Rob. (La.) 355, the

court held that no point of law can be examined which does not arise from the facts stated by the judge; nor can the allegation of any fact not found in such statement receive attention. The very object of the agreement of counsel was to settle the facts of the case that were pertinent to the issues presented for adjudication. Article 244 of the constitution of 1898 confers the right of homestead exemption on every head of a family, or person having a mother or father or a person or persons dependent on him or her for support. The third paragraph reads: "No husband shall have the benefit of a homestead whose wife owns, and is in the actual enjoyment of property or means to the amount of two thousand dollars."

In *Garnier v. Sheriff*, 39 La. Ann. 884, 2 South. 797, this court held that a similar proviso under the homestead law of 1865 was not a condition precedent to the assertion of the husband's homestead right, but was a restraint on its exercise, to be determined by the conditions which existed at the date of the judicial assertion of the homestead exemption. In that case the husband had failed to prove that his predeceased wife owned no property in excess of one thousand dollars in value, and it was shown that his present wife had no property. The case was well considered, and we reaffirm its conclusions. Hence this first contention of defendants is ¹⁸⁸ without merit (1) because it is concluded by the statement of facts, and (2) because it is not good in law.

The second contention of counsel for defendant is that the plaintiff, not being in actual possession or occupancy of the property seized, cannot claim the benefit of the homestead exemption.

The law must be construed with reference to the condition of things existing at the date of the seizure: *Garnier v. Sheriff*, 39 La. Ann. 884, 2 South. 797; *Borron v. Sollibellos*, 28 La. Ann. 355; *Hayden v. Sheriff*, 43 La. Ann. 385, 8 South. 919. In the statement of facts it is admitted that the plaintiff is the owner of the property seized, "and that he was in actual possession of said property as owner at date of seizure." It is, however, argued in the brief of defendant's counsel that the statement of facts shows that the property was not in the actual possession of the plaintiff at the time of the seizure, he being in the penitentiary, and was not in the possession of his wife or children, because they resided on another plantation. It follows, from the statement of facts, that the plain-

tiff was in possession of the property, either personally or through an agent. What took place subsequent to the seizure has no legal relevancy to the question of exemption. Plaintiff did not voluntarily abandon his possession, and his incarceration did not deprive him of any of his property rights.

The third contention of counsel for defendant is that the plaintiff was not the head of a family, and therefore not entitled to the protection-of the homestead laws. It is admitted that the plaintiff had a wife and three minor children at the date of the seizure; but it is argued that none of them were living with him at that time, and none of them were dependent on him for support.

Plaintiff at the date of the seizure was "the head of a family," because he had a wife ¹⁸⁹ and three minor children. The law presumes that they were dependent on the husband and father, because each and every one of them had the legal right to demand of him maintenance and support. The voluntary separation of the husband and wife did not change their marital relations. The circumstance that the two minor daughters resided for the time being with their mother did not absolve the plaintiff from the performance of his parental duties. The circumstance that the boy worked out was creditable to both father and son. Article 244 makes a distinction between the "head of a family" and a "person having a father or mother or a person or persons dependent on him or her for support." The two classes are different. The head of a family is entitled to the exemption, it matters not how much or little he contributes to the support of his wife and children. Other persons must prove that they have dependents on them for support. In *Woods v. Perkins*, 43 La. Ann. 347, 9 South. 48, this court held that, where there are minors in a family who do not own property in their own right in an amount sufficient to maintain them, the widowed father was entitled to the homestead exemption under the constitution of 1879, although the minors in the main earned their own living. See, also, *Maxwell v. Roach*, 106 La. 126, 30 South. 251, the case of a widow and two minors, and *Lyons v. Andry*, 106 La. 356, 87 Am. St. Rep. 299, 31 South. 38, 55 L. R. A. 724, the case of a widower and one minor daughter physically able to earn her own living. Where the family consists of a wife and minor children, there is no room to doubt the right of the husband and father to claim the homestead exemption.

This exemption may be claimed by the surviving wife or minor children of the deceased beneficiary, and hence, as remarked in *Woods v. Perkins*, 43 La. Ann. 347, 9 South. 48, these dependents have an interest in the preservation of the exempt ¹⁹⁰ property during the lifetime of the head of the family. In the case at bar the plaintiff is suing, not only in his own interest, but in that of his wife and children. The suggestion that the latter are not claiming anything is disposed of by the consideration that they have at present no standing in court. Plaintiff, although incarcerated, may still use the property for the benefit of his family.

It is urged that some of the articles are not covered by the constitutional exemption of 1898; but they are embraced in other exemption laws: See Code Prac., art. 644; Act No. 79 of 1876. The statement of facts shows that plaintiff was a farmer, and no issue was made below that the corn seized exceeded the quantity necessary for the current year. There was an intervention filed in the suit, asserting privileges on the property seized for rent and supplies, and there was a judgment in favor of interveners. Plaintiff's prayer that we amend this judgment could not be granted, even if this court had jurisdiction of the issues raised by the intervention, because neither the plaintiff nor interveners have appealed, and a judgment as between coappellees cannot be disturbed.

Judgment affirmed.

The Right of a Homestead Exemption is not necessarily lost by an absence therefrom which is enforced and not voluntary: *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593; *Lyons v. Audry*, 106 La. 356, 87 Am. St. Rep. 299. And a homestead right is not lost by the death, marriage, or removal of some members of the family: *Lyons v. Audry*, 106 La. 356, 87 Am. St. Rep. 299, and cases cited in the cross-reference note thereto; *Davis v. Feltman Co.*, 112 Ky. 293, 99 Am. St. Rep. 289.

As to Who is the Head of a Family within the meaning of homestead and exemption statutes, see the notes to *Wike v. Garner*, 70 Am. St. Rep. 107, and *Wade v. Jones*, 61 Am. Dec. 586.

NEW ORLEANS BASEBALL AND AMUSEMENT COMPANY v. CITY OF NEW ORLEANS.

[118 La. 228, 42 South. 784.]

INJUNCTION—Enforcement of Void Ordinance.—If penal municipal ordinances injuriously affect existing property rights, their legality or constitutionality may be inquired into by a court of equity and their enforcement, in a proper case, enjoined. (p. 370.)

INJUNCTION—Enforcement of Void Ordinance.—If property rights will be destroyed, unlawful interference by criminal proceedings under a void municipal ordinance may be reached and controlled by injunction by a court of equity. (p. 372.)

S. L. Gilmore, city attorney, and J. P. Sullivan, assistant city attorney, for the relator.

J. C. Henriques and C. Rosen, for the respondents.

229 LAND, J. On November 27, 1906, the council of the city of New Orleans adopted Ordinance No. 4,211, which reads as follows, to wit:

“Section 1. That it shall be unlawful for any person or persons to establish or operate a baseball park or parks on any of the following streets or avenues of this city, or within a radius of two squares from such streets or avenues, to wit: St. Charles avenue, Esplanade avenue, Carrollton avenue and Canal street.

“Sec. 2. That any person or persons violating the foregoing section of this ordinance shall be subject to a fine of not more than twenty-five dollars (\$25.00), or to imprisonment for not more than thirty (30) days, or both, at the discretion of the recorder in whose jurisdiction such violation shall take place, and every day during which such baseball park or parks shall be operated in violation of this ordinance shall constitute a separate violation of the same, and shall be punishable as such.”

On November 10, 1906, the New Orleans Baseball & Amusement Company, Limited, a corporation duly chartered for the purpose of establishing, operating, and maintaining a park for the playing of baseball, and to that end to acquire by purchase such property and ground as might be necessary to carry out the objects and purposes set forth in its charter, purchased a certain square of ground in the first district of the city of New Orleans, comprised within and bounded by Carrollton avenue and Banks, Palmyra, and St. James (now

Pierce) streets, for the price of forty thousand dollars, with the intention to erect and operate thereon a baseball park.

On December 10, 1906, said company filed suit in the civil district court of the parish of Orleans, praying for an injunction restraining the mayor and officials of the city ²³⁰ of New Orleans from enforcing said ordinance against the petitioner, and from interfering with petitioner in erecting and operating a baseball park on said square of ground.

The petition charged that said ordinance is illegal, null, and void for the reasons, to wit:

1. That the council of the city of New Orleans had and has no power, right, or authority to pass said ordinance, and the same is ultra vires.

2. That said ordinance is oppressive, unreasonable, unjust, and illegal.

3. That said ordinance deprives petitioner of its property without due process of law, in violation of the constitution and laws of this state, and in violation of the constitution of the United States, and especially the fourteenth amendment thereof.

4. That said ordinance denies to petitioner the equal protection of the laws, in violation of the constitution and laws of this state, and in violation of the constitution of the United States, and especially the fourteenth amendment thereof.

5. That said ordinance operates an illegal discrimination against petitioner, by preventing petitioner from owning and operating a baseball park within the limits named, while others are permitted to own and operate baseball parks within said area, and are so operating the same by and with the consent and acquiescence of the said city of New Orleans.

The petition charges that said ordinance was adopted solely for the purpose of prohibiting petitioner from erecting and operating a baseball park on said square of ground, and that petitioner has been notified by the mayor of the city that said ordinance would be enforced against said company. The petition further alleges that the business of operating a baseball park is legitimate, and licensed by the city and state, and, if properly conducted, affords an innocent, harmless, and pleasant amusement to the people, and the enforcement of said ordinance will damage petitioner ²³¹ in many thousand dollars by deprivation of its franchise and property rights in the premises.

The district judge ordered the defendant city to show cause why the preliminary injunction should not be granted as prayed for by the plaintiff.

The city of New Orleans answered: 1. That the court was without jurisdiction *ratione materiæ* to issue an injunction to restrain the municipal authorities from enforcing a police ordinance, penal in its nature; 2. That plaintiff's petition discloses no cause of action; 3. That the ordinance complained of is legal and valid.

After hearing argument of counsel, the district judge ordered the preliminary writ of injunction to issue as prayed for by the plaintiff. Defendant filed a motion for a new trial, which was denied, and thereupon application was made to the supreme court for a writ of prohibition.

This court ordered the district judge to show cause why the writ of prohibition applied for should not be granted.

The respondent judge, for answer, avers that the civil district court was seised of jurisdiction to issue the injunction and to grant the relief prayed for by plaintiff, and makes part of his answer the record of the cause, including his written opinion assigning reasons for his action, from which we make the following extracts, to wit:

"The substance of the petition is that plaintiff purchased a piece of property and proposed to erect thereon a baseball park, in which to play baseball, and thereafter the city of New Orleans, for the purpose of preventing its operating that baseball park, passed an ordinance prohibiting baseball parks in a certain area. It is alleged in the petition that other baseball parks are operated in the same area, and in the argument of counsel on this application it is admitted or stated that there are from two to three baseball parks in that same area, which had existed there for twenty-five years before the passage of this ordinance.

"This court has jurisdiction to preserve property rights. It makes no difference, where the court undertakes to preserve property rights, ²³² that it has to deal, in connection therewith, with criminal ordinances.

"Now, in passing upon this application, the allegations of the petition must be taken as true. The playing of baseball on a park, or keeping a baseball park, is not a nuisance *per se*. It cannot be declared a nuisance by ordinance, nor can an ordinance be passed to prevent the playing of baseball in a park in a certain area, in a park owned by certain persons,

and permit certain other persons in the same area to play or continue to play the game of baseball in a park owned by them. Such an ordinance is discriminatory and personal, and, if the facts or allegations in the petition are true, it is certainly illegal, null, and void."

The writ of prohibition issues to the judge of the inferior court where the cognizance of the cause does not belong to such court or it is not competent to decide it: Code Prac., art. 846.

In the case at bar the city contends that the civil district court for the parish of Orleans is without jurisdiction to issue an injunction, when it appears that the effect of the injunction is to prohibit the enforcement of an ordinance in the nature of a police regulation, and that the question of the legality and constitutionality of such an ordinance should be left to the court in, and to the occasion upon, which the attempt is made to enforce it. It is argued that jurisdiction is vested in the recorders' courts in the city of New Orleans for the trial of offenses against city ordinances, subject to an appeal to the criminal district court for the parish of Orleans, and that the civil district court of said parish is without any criminal jurisdiction whatever: Const. 1898, arts. 133, 139, and 141. There can be no doubt as a general proposition that the civil district court has jurisdiction of all ordinary injunction suits against the city of New Orleans; but it is contended that such court is not competent to enjoin the enforcement of a quasi criminal ordinance, and in so doing exceeded its legitimate powers. In *State v. Judges*, 35 La. Ann. 1075, it was pointed out that a court may have jurisdiction of the subject matter in controversy, and at ²³³ the same time exceed its legitimate powers in the premises, as when the court enjoined a city council from exercising its delegated power of motion of one of its officers.

In *Boin v. Town of Jennings*, 107 La. 410, 31 South. 866, the plaintiff had enjoined the execution of an ordinance prohibiting the selling or giving away of spirituous liquors within the corporate limits of the town. This court held that the inferior court properly declined jurisdiction to maintain the injunction, the effect of which was to prohibit the enforcement of an ordinance in the nature of a police regulation, saying that "the question of the legality or constitutionality of such ordinance, whether to all its provisions, or in part, should be left to the court in which the attempt is made to

enforce it, a remedy by appeal to this court being open, in such cases, to the party as against whom the attempt is made," and citing *New Orleans v. Becker*, 31 La. Ann. 644; *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 South. 575; *Darcantel v. People's Slaughter-house Company*, 44 La. Ann. 632, 11 South. 239; *State v. Judge*, 48 La. Ann. 1448, 21 South. 28; *Lecourt v. Gaster*, 49 La. Ann. 487, 21 South. 646; *State v. Crozier*, 50 La. Ann. 245, 23 South. 288. In the case of *Boin v. Town of Jennings*, 107 La. 410, 31 South. 866, plaintiff alleged irreparable damage to his business of conducting a barroom. In *Devron v. First Municipality*, 4 La. Ann. 11, it was held that an injunction would not lie to restrain a municipal corporation from instituting suit before a justice of the peace against a party for infractions of an ordinance prohibiting the sale of groceries in the vegetable market. In *Levy v. City of Shreveport*, 27 La. Ann. 620, it was held that the plaintiff could not test the authority of the mayor to enforce the ordinance of the city prohibiting private markets, and the legality of said ordinances, by an injunction.

In *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 South. 575, the same doctrine was announced as to an ordinance changing the location of ²³⁴ dairies, the plaintiff alleging damage to her business and property rights. The court held that the ordinance was a police regulation, in the interest of public health, with a penalty for its violation, and if it was unconstitutional, as alleged, the plaintiff could suffer no injury, as she could urge her defense in the recorder's court, and, failing there, had her remedy by appeal to the supreme court.

In all of the cases cited the ordinances sought to be enjoined were relative to matters clearly within the domain of the police power, such as the traffic in intoxicating liquors, markets, dairies, slaughter-houses, and the like.

There is a line of decisions, however, to the effect that, where penal ordinances injuriously affect existing property rights, their legality or constitutionality may be inquired into by a court of equity, and their execution in a proper case enjoined.

In *L'Hote v. City of New Orleans*, 51 La. Ann. 93, 24 South. 608, 44 L. R. A. 90, this court said: "The plaintiff seeks the injunction for the protection of his rights of property, menaced, as he conceives, by an illegal ordinance. The right of the citizen to that protection is too clear for dispute."

The ordinance in that case was sustained as a proper exercise of the police power, yet the jurisdiction of the court to issue the injunction was affirmed. In that case the decision was bottomed on the principles announced in *High on Injunctions*, section 68, from which we make the following extracts, viz.: "So equity will not interfere by injunction to restrain municipal officers from the prosecution of suits for the violation of city ordinances, such proceedings being of a quasi criminal nature, since equity will not interfere with the execution of the criminal law, whether pertaining to the state at large, or to municipalities, which are agents in the administration of the civil government. . . . If, however, the act concerning which an arrest or criminal prosecution is threatened affects civil property and its enjoyment, in protecting the property right, equity may properly enjoin the criminal prosecution. ²³⁵ But in such case its interference is founded solely upon the ground of injury to property and the necessity of preserving property rights; and, where such rights are not clearly involved, the relief will be denied."

In the case of *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. Rep. 18, 49 L. ed. 169, the question was thoroughly considered, and the following principles announced:

1. Municipal ordinances, and even legislative enactments, are subject to investigation by the courts, with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with constitutional rights to carry on a lawful business, make contracts, or use and enjoy property.

2. While the right to exercise the police power is a continuing one, and a business lawful to-day may in the future become a menace to the public welfare and be required to yield to the public good, the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment.

3. Although an ordinance may be lawful on its face and apparently fair in its terms, yet, if it is enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power will be invalidated by the courts.

4. Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.

In that case the plaintiff had purchased grounds for the erection of gasworks, within the prescribed limits for such plants, and had commenced the construction of the same, when the municipal authorities arbitrarily changed the limits so as to exclude such grounds and works. The court said that the allegations of the bill disclosed facts sufficient ²³⁶ to bring the case "within the class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power, which amounts to a taking of property without due process of law, and an impairment of property rights protected by the fourteenth amendment to the federal constitution."

As the plaintiff in this case claims the protection of such amendment, the views of the supreme court of the United States above enunciated must be accepted as controlling. The case as presented by the plaintiff's petition herein need not be repeated. Suffice it to say that, taking all the allegations of the fact for true, a case is presented of a personal, discriminatory, and arbitrary ordinance, the execution of which will greatly impair the plaintiff's right of property. We have not been referred to any provision of the city charter which subjects the game of baseball as described in the petition to the police power of the municipal authorities. The playing of baseball does not injuriously affect the public health or morals, and is not a public nuisance any more than any other athletic sport. The power of the city council to enact any such ordinance may well be questioned.

It is therefore ordered that the rule issued herein be discharged, and that relator's application be dismissed, with costs.

INJUNCTION AGAINST ENFORCEMENT OF VOID MUNICIPAL ORDINANCES.

- I. General Principles, 372.
- II. Criminal Prosecutions, 374.
- III. Multiplicity of Suits, 375.
- IV. Irreparable Injury, 376.
- V. Interference With Contract or Vested Rights, 377.

I. General Principles.

Although there is some conflict in the cases, the great weight of authority tends to establish, as the better rule, that where a municipal ordinance is void, and its provisions are about to be enforced, any person who is injuriously affected thereby, either in his person or property, may, and properly ought, to go into a court of equity.

and have the enforcement of the ordinance stayed by injunction. The following cases, among others, maintain that the enforcement of a void ordinance is better and more properly resisted by injunction than by any common-law remedy: *Gould v. Mayor of Atlanta*, 55 Ga. 678; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758, 42 L. R. A. 696; *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718; *Spiegel v. Gansberg*, 44 Ind. 418; *City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Page v. Mayor of Baltimore*, 34 Md. 558; *Mayor of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Mayor of Baltimore v. Scharf*, 54 Md. 499; *Deems v. Mayor of Baltimore*, 80 Md. 164, 45 Am. St. Rep. 339, 30 Atl. 648, 26 L. R. A. 541; *People v. Mayor of New York*, 32 Barb. 35; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *Appeal of Harper*, 109 Pa. 9, 1 Atl. 791; *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720. The enforcement of a void municipal ordinance may be enjoined in equity, it is generally maintained, although its invalidity has not been determined in an action at law: *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649. As to the right to go into equity in the first instance to enjoin the enforcement of a void ordinance, the court, in *Mayor of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, said: "As to the question of jurisdiction we have no doubt. It has been decided by this court in too many cases to be longer open to question, that where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction at the suit of any person injuriously affected thereby to stay its execution by injunction."

On the other hand, there are a number of cases maintaining that before the injunctive aid of a court of chancery can be successfully invoked to restrain the enforcement of a void ordinance, its invalidity must be established by an action at law: *Forcheimer v. Port of Mobile*, 84 Ala. 126, 4 South. 112; *Dunham v. City of New Britain*, 55 Conn. 378, 11 Atl. 354; *Marvin Safe Co. v. Mayor of New York*, 38 Hun, 146; *Schulz v. City of Albany*, 27 Misc. Rep. 51, 57 N. Y. Supp. 963.

It has also been held that the ordinary remedy for an injury from the operation of an unlawful municipal ordinance is by an action at law, and not by injunction, for complete redress in damages is generally thus attainable: *Torpedo Co. v. Borough of Clarendon*, 19 Fed. 231. In *West v. Mayor of New York*, 10 Paige, 539, a bill was filed to restrain the city of New York from prosecuting suits against the complainant for breach of an ordinance alleged to be illegal, and the court held that the question of the validity of such ordinance did not properly belong to a court of chancery for decision, as the complainant had a perfect defense at law if the ordinance were invalid, or did not render the complainant liable for the

penalty. In North Carolina it has been repeatedly maintained that the remedy for an injury resulting from the operation of an unlawful city ordinance is not by injunction, as the injured person has a complete redress in an action at law for damages: *Cohen v. Commissioners of Goldsboro*, 77 N. C. 2; *Rosenbaum v. City of Newbern*, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123. In that state it is held that an injunction will not be granted to prevent the enforcement of an alleged unlawful municipal ordinance, nor can an action be maintained which only seeks to have such ordinance adjudged void: *Wardens of St. Peter's etc. Church v. Town of Washington*, 109 N. C. 21, 13 S. E. 700; *Paul v. Washington*, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902.

It has also been decided that where all the provisions of an ordinance are not void, its enforcement cannot be enjoined: *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726. Also that where the enforcement of the ordinance will result in a mere trespass for which an adequate remedy at law exists, equity will not enjoin its enforcement though the ordinance is void: *Town of Orange City v. Thayer*, 45 Fla. 502, 34 South. 573. And that the enforcement of a void city ordinance, not resulting in irreparable injury to vested property rights, cannot be restrained by injunction: *Wade v. Nunnelly*, 19 Tex. Civ. App. 256, 46 S. W. 668.

II. Criminal Prosecutions.

Some cases draw a distinction between injunctive relief from void ordinances which involve a criminal prosecution and those which may work an irreparable injury, or injuriously affect private property rights, and hold that in the former case the enforcement of the ordinance cannot be enjoined, while in the latter case it may be. Thus, it has been decided that a court of chancery will not restrain quasi criminal proceedings by the authorities of a municipal corporation for repeated violations of an alleged invalid ordinance: *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115. And that courts of chancery have no jurisdiction to enjoin criminal or quasi criminal prosecutions under void ordinances: *Skakel v. Roche*, 27 Ill. App. 423. In this case it was said that "the general rule is well settled, and has been repeatedly announced in Illinois, that a court of equity will not entertain a bill to restrain prosecution under a municipal ordinance on the ground of the alleged illegality of such ordinance. The validity of an ordinance of the character of the one involved here can only be tested by an appeal from a fine imposed under it. Courts of chancery have no jurisdiction to enjoin criminal or quasi criminal prosecutions." And in a later case in the same state it was decided that a court of equity will not interfere by injunction to restrain prosecutions under municipal ordinances, even though they may be void, for the reason that the person prosecuted has an adequate remedy at law, and that if the ordinance is void, that of itself will defeat a prosecution under it: *Chicago etc. R. R. Co. v. City of Ottawa*, 148

Ill. 397, 36 N. E. 85; citing with approval, *Poyer v. Village of Des Plaines*, 123 Ill. 111, 5 Am. St. Rep. 494, 13 N. E. 819. Other cases, however, fail to note any material distinctions between a bill for an injunction to restrain the enforcement of a void ordinance involving a criminal prosecution and one involving irreparable injury or other ground for equitable relief. Nor do we believe that any just ground for such distinction exists.

If an ordinance is totally void, its attempted enforcement by repeated prosecutions ought to be, and will be, enjoined: *City of Rushville v. Rushville National Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321. An injunction against a void municipal ordinance forbidding and making criminal interments in a cemetery may rightfully be issued by a court of equity: *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528. And to the same effect is *City of Atlanta v. Gate City etc. Co.*, 71 Ga. 106. Municipal ordinances, though they may be penal in their character, are not criminal statutes, so as to prevent their validity from being tested, or their enforcement restrained, by injunction in the civil courts: *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649.

III. Multiplicity of Suits.

The cases are agreed that the enforcement of a void municipal ordinance may be enjoined to prevent a multiplicity of suits at the instance of any person whose interests are impaired by it, provided the rights of many persons are affected by the ordinance in the same way: *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907, 49 L. R. A. 408. A court of equity may, on a proper case, enjoin the enforcement of a void city ordinance affecting many persons, to prevent a multiplicity of suits. In such case, any person whose interests are to be injuriously affected by such ordinance may go into a court of equity and have its enforcement stayed by injunction: *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726. A court of equity, in order to avoid a multiplicity of suits, may enjoin the enforcement of an illegal ordinance where it appears that the interests of the complainant and many other persons are identical and are injuriously affected by the ordinance: *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718; *Brown v. Trustees of Catlettsburg*, 11 Bush, 435. For the purpose of preventing a multiplicity of suits, an injunction lies to restrain the enforcement of an ordinance not previously declared invalid: *Kappes v. City of Chicago*, 119 Ill. App. 436. But if the controversy is between two persons only, or where but few persons are involved, then unless complainants have established at law the invalidity of the ordinance, a court of equity will not interfere: *Poyer v. Village of Des Plaines*, 123 Ill. 111, 5 Am. St. Rep. 494, 13 N. E. 819. To give a court of equity jurisdiction to enjoin the enforcement of an alleged void ordinance to prevent a multiplicity of suits, there must be a right affecting many persons,

and if it affects but two, the bill will not lie, unless the complainant's right has been established at law: *Chicago etc. R. R. Co. v. City of Ottawa*, 148 Ill. 397, 36 N. E. 85. But a court of equity has jurisdiction of a suit to enjoin the enforcement of an illegal city ordinance imposing a license tax, where, in addition to the illegality of the tax, it is shown that if the city is permitted to proceed to enforce it by the remedies provided, complainant will be called upon to defend a multitude of criminal prosecutions: *City of Hutchinson v. Beckhan*, 118 Fed. 399, 55 C. C. A. 333; and this, though none of such threatened prosecutions have in fact been commenced: *Schlitz Brewing Co. v. City of Superior*, 117 Wis. 297, 93 N. W. 1120.

IV. Irreparable Injury.

A court of equity always has jurisdiction to enjoin the enforcement of an invalid municipal ordinance when necessary to prevent an irreparable injury: *City Council of Montgomery v. Louisville etc. R. R. Co.*, 84 Ala. 127, 4 South. 626; *Town of Orange City v. Thayer*, 45 Fla. 502, 34 South. 573; *Gould v. Mayor of Atlanta*, 55 Ga. 678; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758; *Brown v. Trustees of Catlettsburg*, 11 Bush, 435; *Morris Canal etc. Co. v. Mayor of Jersey City*, 12 N. J. Eq. 252; *Cape May etc. R. R. Co. v. City of Cape May*, 35 N. J. Eq. 419; *Wade v. Nunnelly*, 19 Tex. Civ. App. 256, 46 S. W. 668; *Schlitz Brewing Co. v. City of Superior*, 117 Wis. 297, 93 N. W. 1120. An injunction against the enforcement of a void municipal ordinance should be granted when there is no plain, adequate remedy at law, and it is necessary to prevent an irreparable injury: *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528. An injunction lies to restrain the enforcement of municipal ordinances, admitted to be invalid, the execution of which injuriously affects private rights and works an irreparable injury: *Deems v. Mayor of Baltimore*, 80 Md. 164, 45 Am. St. Rep. 339, 30 Atl. 648, 26 L. R. A. 541.

A court of equity has jurisdiction of a suit to enjoin the enforcement of an illegal city ordinance when the complainant will suffer irreparable injury in his business from its enforcement: *City of Hutchinson v. Beckham*, 18 Fed. 399, 55 C. C. A. 333. So a city may be enjoined from prosecuting a person for the violation of an illegal ordinance, when such prosecution tends to impair vested rights and inflict irreparable injury without authority of law: *Platt etc. Milling Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036.

A court of equity, state or federal, has jurisdiction to enjoin the enforcement of an invalid ordinance when its enforcement would cause loss of business, expense and hardship to the complainant, and result in irreparable injury to him: *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121. Any ordinance which would deprive a citizen of the power to exercise his lawful trade or privilege must be considered

as working an irreparable injury, particularly when the city is attempting to do an act clearly unconstitutional, and the protection of the writ of injunction should be allowed to prevent its enforcement. And to forbid the interference of equity in such a case, it must appear clearly that the complainant has a remedy at law which is plain and adequate, and as practical and efficient to the ends of justice and its prompt administration as the remedy sought for in equity: *Barthet v. City of New Orleans*, 24 Fed. 563.

A bill seeking an injunction against the enforcement of an alleged illegal ordinance on the ground that it will work an irreparable injury must allege facts to enable the court to determine whether the injury will be irreparable as alleged. A mere general allegation that the injury will be irreparable will not suffice: *Town of Orange City v. Thayer*, 45 Fla. 502, 34 South. 573; *Chicago etc. R. R. Co. v. City of Ottawa*, 148 Ill. 397, 36 N. E. 85.

V. Interference With Contract or Vested Rights.

The enforcement of a void municipal ordinance impairing vested property rights may be restrained by injunction: *Platt etc. Milling Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036; *Cape May etc. R. R. Co. v. City of Cape May*, 35 N. J. Eq. 419; *Wade v. Nunnelly*, 19 Tex. Civ. App. 256, 16 S. W. 668. An ordinance illegally and wrongfully reducing water rates, where the constitution and laws of the state denounce severe pains and penalties upon collections of higher rates than those prescribed by the ordinance, so affects the water company's vested property rights, and hinders it in the collection of its lawful compensation, that equity will afford protection by injunction against such ordinance, even though the city is taking no active steps to enforce it. And an injunction against the enforcement of such ordinance will not be refused on the theory that if it is void at all it is void on its face, and therefore throws no cloud on plaintiff's rights, when the invalidity appears only in connection with a certain water contract, and with evidence aliunde showing what water rates were charged at the date of such contract: *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720.

A federal court of equity may grant relief by injunction against the enforcement of a city ordinance which impairs the contract or vested rights of the complainant, or deprives him of his property without due process of law: *Cleveland City Ry. Co. v. City of Cleveland*, 94 Fed. 385; and such court has jurisdiction of a suit by a water company to enjoin the enforcement of an illegal ordinance fixing rates to be charged for water, on the ground that it impairs the obligation of a contract between the city and the company: *Los Angeles City Water Co. v. City of Los Angeles*, 103 Fed. 711. A water company is entitled to an injunction to restrain a city or

private persons from enforcing an illegal ordinance reducing its water rates, as impairing the obligation of a contract between it and the city and as subjecting the company and its officers and employés to penal action for its violation: *Los Angeles City Water Co. v. City of Los Angeles*, 103 Fed. 711.

JOHNSON v. LEVY.

[118 La. 447, 43 South. 46.]

BREACH OF MARRIAGE PROMISE—Death of Obligor.—The obligation to fulfill a promise of marriage is personal and not heritable, and the obligation to respond in damages for the breach of such promise is incidental thereto, and if the obligor die before compliance with his promise and before he is put in default, no action will lie against his heirs to recover damages for noncompliance. (p. 380.)

BREACH OF MARRIAGE PROMISE—Death of Obligor—Recovery from Heirs.—If the obligee in a marriage promise obtains judgment against the obligor for the damages resulting from a breach of his promise, such judgment may be enforced against his heirs in the event of his death before satisfying it. (p. 381.)

BREACH OF MARRIAGE PROMISE—Death of Obligor—Recovery from Heirs.—An obligor in a promise to marry may abandon his right to comply with his promise and voluntarily bind himself to pay the damages resulting from his noncompliance, and the obligation thus assumed may be enforced against his heirs in the event of his death. (p. 381.)

BREACH OF MARRIAGE PROMISE—Default and Death of Obligor—Recovery from Heirs.—If the obligor in a promise to marry is put in default according to law, his right to fulfill his promise is thereby forfeited, and his obligation to marry becomes merged in his obligation to respond in damages, which becomes heritable and may be enforced against his heirs in the event of his death. (p. 381.)

BREACH OF MARRIAGE PROMISE—Damages—Injury to Feelings and Reputation.—Damages arising from a breach of promise to marry resulting in injury to feelings, reputation and standing are actual or compensatory, as contradistinguished from exemplary, and if the liability of the obligor is fixed, by his being put in default according to the statute, they may be recovered in the same manner and to the same extent as damages to person or property. (pp. 381, 382.)

D. Caffery & Son, J. C. Briant and O'Niell & Alpha, for the appellant.

H. Gagné, Foster, Milling, Godchaux & Sanders and A. Brian, for the appellees.

448 MONROE, J. Plaintiff alleges that in 1901 she became engaged to be married to Lazare Levy, and, whilst so

engaged, was seduced by him; that he repeatedly promised to fulfill his engagement, but failed to keep his promises, and, on June 29, 1903, was put in default by formal demand, with which he refused to comply; that thereafter plaintiff gave birth to a child, issue of her connection with said Levy, and, as a consequence of his refusal to marry her, is condemned to a life of social ostracism, disgrace, and poverty, and is injured and damaged in the sum of ⁴⁴⁹ twenty thousand dollars. She alleges that said Levy died on June 29, 1903, and that the three parties made defendants herein (who reside in the parish of Terrebonne), with six others (who reside elsewhere), brothers and sisters of decedent, have accepted his succession unconditionally, and are liable to her jointly for the damages so sustained. Wherefore she prays for judgment against said defendants, each for his virile share of the amount stated. Defendants filed an exception of no cause of action, which was overruled. They then further excepted and pleaded to the merits. When the case was called for trial plaintiff offered certain testimony in support of the allegations of her petition, whereupon "counsel for defendants objected to the evidence, and to any and all other evidence to be offered on behalf of plaintiff, in support of the allegations of her petition, upon the grounds and for the reasons: 1. The plaintiff sues for the breach of a marriage contract, and the same petition shows the death of the promisor, Lazare Levy, and an action instituted against his heirs. This being shown on the face of the petition, no cause of action lies against the heirs, since the action for breach of promise is an entirely personal action, and not heritable. 2. If it could be contended that the action of breach of promise of marriage can be instituted against the heirs of Lazare Levy for a recovery of pecuniary or specific damages to the person or property of the plaintiff in this case, there is no averment of damage to property, but a simple averment of damage to the feelings of the plaintiff herein, therefore . . . no evidence whatever is admissible to support the demand of the plaintiff."

The court having sustained this objection, counsel for plaintiff announced that it was "impossible for them to proceed any further, inasmuch as they could not introduce any evidence to sustain the allegations of their petition," and, after some discussion as to the ⁴⁵⁰ proper course to be pursued, the court "discharged the jury from any further consideration of the case, and ordered the plaintiff's demand dismissed,

as in case of nonsuit," and from the judgment so rendered plaintiff has appealed.

It has been argued here that, plaintiff having declined to proceed, the judgment appealed from is to be regarded as having dismissed the suit for want of prosecution. We are, however, of opinion that the dismissal of the suit was the logical and inevitable consequence of the exclusion of the testimony offered and to be offered, in support of plaintiff's demand, and that the appeal from the judgment of dismissal brings up that ruling for review.

The obligation resulting from a marriage engagement, or promise of marriage, is personal, and not heritable, because no one but the obligee can enforce its performance, and it can be enforced against no one but the obligor: Civ. Code, art. 1996 et seq. The obligation to respond in damages for the breach of such contract springs from the contract itself, as one of the incidents of its obligations: Civ. Code, arts. 1763, 1930. Unless time be made of the essence of the contract, the obligor may comply with his obligation thereunder at any seasonable moment until he is put in default; from which it follows that, if the obligor die before compliance and before he is put in default, no action will lie to enforce compliance or to recover damages for noncompliance. In such case the obligation to respond in damages retains its status as a mere incident of the obligation to comply with the promise of marriage, and, as the principal obligation ceases to exist, its incidents cease likewise. The obligation to respond in damages may, however, lose its incidental character, and assume a new and independent form. Thus the obligee may obtain judgment against the obligor for the ⁴⁵¹ damages, in which event the judgment could be enforced against the heirs of the obligor should he die before satisfying the same; or the obligor may abandon his right to comply with his promise, and voluntarily bind himself to pay the damages resulting from his noncompliance, and the obligation thus assumed could be enforced against his heirs. Or (and we now come to the position of the plaintiff before the court), the right of the obligor to comply with his promise of marriage may be forfeited, and his liability for damages fixed, by certain legal proceedings. The law provides that a contract may be violated "passively by not doing what was covenanted to be done, or not doing it at the time or in the manner stipulated or implied from the nature of the contract": Civ. Code, art. 1931.

And that, in such case, "damages are due from the time that the debtor has been put in default," etc.: Civ. Code, art. 1933. And specific provision is made as to the manner of putting in default: Civ. Code, art. 1911 et seq. "The object of the putting in default [this court has said] is to secure to the creditor his right to demand damages, or a dissolution of the contract, so that the debtor can no longer defeat this right by executing, or offering to execute the agreement. After the debtor has been put in mora, his offer to execute his engagement comes too late and cannot be listened to: 6 Toullier, 255"; Moreau v. Chauvin, 8 Rob. 157; Enders v. Gringras, 38 La. Ann. 773; Clover v. Gottlieb, 50 La. Ann. 568, 23 South. 459. Plaintiff herein alleges that the promisor, Lazare Levy, was put in default; that is to say, that a demand was made upon him, as provided by law, to comply with his engagement to marry her; that he refused so to comply, and that she thereby sustained damages as set forth in her petition, and these allegations are taken as true, for the purposes of the case as now presented.

As a result of the putting in default, the ⁴⁵² obligation to marry, which could have been fulfilled by the obligor alone, became merged in the obligation to respond in damages for the nonfulfillment, since the right of the obligor to fulfill was thereby forfeited, and, considering the nature of the contract, specific performance could not have been enforced by the obligee. The obligation to respond in damages, from having been merely incidental to the other, became, therefore, the sole obligation left of the contract, and, being susceptible of fulfillment by another, as well as by the obligor, may be enforced against the heirs of the latter. In other words, the personal obligation, to marry, was resolved, by the putting in default, into the heritable obligation, to pay money, the amount of which may be determined by agreement, or suit.

Counsel for defendant argue that the right of action here asserted has not survived for the reason that the damages claimed are alleged to have resulted from injury to the feelings of plaintiff, rather than to her person or property. But the law of this state affords no support for the argument. It is true that the right to demand exemplary or vindictive damages (if such right be accorded by the civil law) perishes with the debtor, for the reason that such damages are awarded, over and above the amount necessary to compensate the injury complained of, by way of punishment to the wrongdoer and

of warning to others, and could not, reasonably, be awarded against the unoffending heirs of the wrongdoer. The damages here demanded are, however, recognized by the law and jurisprudence of Louisiana as actual, or compensatory (Civ. Code, arts. 1930, 1934, subd. 3, 2315; *Byrne v. Gardner*, 33 La. Ann. 6; *Ross v. Goldman*, 36 La. Ann. 132; *Dirmeyer v. O'Hern*, 39 La. Ann. 961, 3 South. 132; *Steinhardt v. Leman*, 41 La. Ann. 835, 6 South. 665; *Chaffe v. McKenzie*, 43 La. Ann. 1062, 10 South. 369; *Wimbish v. Hamilton*, 47 La. Ann. 246, 16 South. 856; *Fitzpatrick v. Daily States Publishing* ⁴⁵³ Co., 48 La. Ann. 1116, 20 South. 173; *Lewis v. Holmes*, 109 La. 1030, 34 South. 66, 61 L. R. A. 274; *Graham v. Western Union Tel. Co.*, 109 La. 1069, 34 South. 91), and where, as in this case, it appears that the liability therefor is fixed (subject to the obligation of the claimant to prove his case) there is no reason why they should not be recovered in the same manner, and to the same extent, as damages to person or property. We are referred to decisions by courts in other jurisdictions holding a different view—some for one reason, and some for another—but none for any reason which finds support in the law of Louisiana. In the cases of *Smith v. Sherman*, 4 Cush. (Mass.) 408, and *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250, the courts based their decisions upon constructions of state statutes which are not before us. In *Lattimore v. Simmons*, 13 Serg. & R. 183, the court placed its denial of the right of the plaintiff, in the case before it, to recover from the heirs of the obligor (in a marriage engagement) for injury to feelings, upon the grounds: 1. That at common law the rule that a personal action dies with the person extends to all actions for damages for wrongs attended with actual force, such as assault and battery, and trespass, vi et armis, and to slander, and that it would be reasonable, as a deduction therefrom, to extend to all cases, even though arising ex contractu, not predicated upon injury to person or property; 2. That, in the case before it, the court did not perceive that the property of the plaintiff was in any manner affected; 3. That whether plaintiff's hopes and feelings would have been disappointed or gratified was beyond the reach of human scrutiny. The first ground has no application here for the reason that our Code of Practice provides:

“Art. 25. Heirs and universal legatees may be sued for civil reparation of the injury caused by the crimes and misdemeanors of the deceased whose succession they have accepted,

although no action was instituted for that purpose against the deceased during his life, and although neither ⁴⁵⁴ he nor his heirs have benefited by such offense."

The injury thus provided for is not confined to that inflicted upon person or property, and it has been so held by this court in the latest case, to which we have been referred, in which the matter was considered: *Dirmeyer v. O'Hern*, 39 La. Ann. 961, 3 South. 132. The second ground is included in the first. We may say, however, in that connection, that the obligation of Lazare Levy to marry the plaintiff carried with it an obligation to maintain and provide for her, and, unless otherwise agreed, carried the right, so far as she was concerned, to share his earnings, and, in the event of his dying rich, and leaving her in need, to take a portion of his estate. As to the third ground: as our law provides that damages may be recovered for disappointed hopes and injured feelings, it would evidently be the duty of a court to hear a case presenting a claim for such damages, and determine the reach of human scrutiny after considering the evidence adduced. In *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 46, to which we are also referred by the learned counsel, we are informed by the brief that, after referring to the views expressed in *Lattimore v. Simmons*, the court added that damages for injuries to feelings might be, and frequently are, vindictive, and, if decreed, might bankrupt the estate of the debtor, to the prejudice of his creditors. It seems to us, however, that the courts cannot be closed against a litigant claiming compensatory damages for fear that vindictive damages might be improperly awarded. We are further referred to the cases of *Jones v. Succession of Hoss*, 29 La. Ann. 564, and *Edwards v. Ricks*, 30 La. Ann. 926, decided by our predecessors in this court. In the case first mentioned suit was brought against the succession of the deceased administrator of an estate for damages alleged to have been sustained by reason of ⁴⁵⁵ the rejection of plaintiff's bid for the lease of certain premises offered for sale, by order of court, at public outcry, and part of the sum claimed was alleged to be due on account of the "malicious outrage and indignity" to the credit of plaintiff. The court held that the bid was properly rejected, and that there was no "malicious outrage," etc., in the matter, and, after reaching that conclusion, said: "That part of the demand which is based upon the alleged malicious outrage and indignity need not be seriously considered. Actions for such wrongs die with the

wrongdoers, and they cannot be maintained against the heirs and representatives of the deceased even when they are well founded in fact."

In the case of *Edwards v. Ricks*, 30 La. Ann. 926, the suit was brought against Ricks and the widow and heirs of Varnado for damages inflicted by Ricks and Varnado in unlawfully dispossessing plaintiff's family of their dwelling. It does not appear that anything was claimed for injury to feelings, though it is to be inferred that such was the case, and the court seems to have proceeded upon the theory that such damages are vindictive and that it was so decided in the case of *Jones v. Succession of Hoss*, 29 La. Ann. 564. In so far, however, as the cases cited support that view, the decisions must be considered as overruled.

For the reasons thus assigned, it is ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and this cause remanded to the district court, to be there proceeded with according to law, and to the views expressed in this opinion; the costs of the appeal to be paid by the defendants, and all other costs to await the further action of the trial court.

An Action for a Breach of Promise to Marry does not, according to some authorities, survive against the personal representatives of the promisor: *Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 146; *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250. See, too, *Payne's Appeal*, 65 Conn. 397, 48 Am. St. Rep. 215.

DAMONTE v. PATTON.

[118 La. 530, 43 South. 153.]

ANIMALS—Liability for Damage Caused by.—The owner of an animal is responsible for the damage he has caused, and the presumption is that the owner of the animal is in fault, the burden being on him to show that he was without the slightest fault and did all that was possible to prevent the injury. (p. 387.)

NEGLIGENCE—Liability for Injury from Runaway Horse.—It is negligence for the driver of a horse to leave him standing loose in a public street, and if such horse runs away, thereby inflicting an injury on a third person, who is without fault, the owner of the horse is liable therefor. (p. 387.)

NEGLIGENCE—Liability for Injury from Runaway Horse.—It is negligence for the driver of a horse and cart, the latter with-

out lights, to leave such horse standing loose on the street on a dark night, and if the horse runs away and dashes into an electric car coming from an opposite direction, with the result that the motorman thereon is knocked off the car and injured, the owner of the horse is liable therefor, especially when it was impossible for the motorman to have seen the danger in time to avoid the accident. (p. 388.)

NEGLIGENCE—Injury from Runaway Horse—Contributory Negligence.—The motorman on an electric car is not guilty of contributory negligence in failing to anticipate such a danger as a collision with a runaway horse and wagon, without a driver and without lights, in the darkest hour of the night, rushing unexpectedly toward him, such runaway being caused by the negligence of the driver of such horse. (p. 388.)

J. Wilkinson and Woodville & Woodville, for the appellant.

C. G. Collins and F. Estopinal, for the appellee.

⁵³¹ LAND, J. This is a suit for damages for personal injuries alleged to have been occasioned on the night of February 3, 1905, by a collision between a runaway horse and wagon belonging to the defendant and a street-car, operated by plaintiff as motorman. The petition charges that the defendant was guilty of negligence in leaving his horse and wagon standing in the street without securing the same or leaving some one in charge thereof; that while petitioner was operating his car at 3:15 o'clock in the morning, and coming down Coliseum street, he was suddenly confronted with said horse and wagon, without a driver or lights, dashing up the street with break-neck speed; and that it was impossible to stop the car in time to avoid the collision, which smashed the dashboard of the car, and inflicted serious and painful injuries on the plaintiff. The petition charges that plaintiff's left foot was broken and the ligaments of his left knee were injured, causing him great pain and suffering, and permanent injury. Plaintiff alleges that he is entitled to recover fifteen hundred dollars for pain and suffering, five thousand dollars for loss of earning capacity, and for being made a cripple for life, and five hundred dollars for punitive and exemplary damages.

Defendant answered, pleading the general issue and contributory negligence, but admitting the ownership of the horse killed in the collision referred to in the petition.

The case was tried before the court without ⁵³² a jury, and there was judgment in favor of the defendant. Plaintiff has appealed.

In his written opinion, the judge says: "Defendant's driver lost his hat. He got out of his wagon to get his hat. The horse started off. He started for his wagon, but his foot slipped, and the horse got away."

According to the testimony of the driver, the wind blew off his hat, and he thereupon turned his horse toward the gutter and got off the wagon, and when he went to get his hat in the drizzling rain the horse "ran off."

The driver promptly followed his horse and cart a considerable distance, and found his wagon "stuck up in the Coliseum car," and his horse on the side with a broken leg. The driver says: "I told the corporal I left my horse standing to go and get my hat, and, while I was doing that, the horse ran away. If I had not slipped, I would have caught her."

The conductor of the car testified that the driver said, after the accident, that while he was delivering meat his horse ran away. The driver denied making such statement. One witness saw the horse near the Ninth Street Market, going at a slow trot, and tried to head him off, but the animal "ran out Harmony street." The market referred to is twenty-three squares from the place of the accident. There is no affirmative testimony that the horse was gentle, but the judge seems to infer that he was, because two witnesses testified that on the night in question he was not traveling very fast. A witness for the plaintiff testified that the defendant said: "That was a wild horse I had. He did not care for the horse." Defendant did not deny making such a statement, but the judge remarks that the testimony was taken out of court and out of the presence of the defendant, who was not questioned as to the alleged statement. The judge seems to have been mistaken as to the absence of the defendant, as the record reads as follows: "Witness, pointing out Mr. Patton, who had entered the room after his evidence began, says ⁵³³ that 'He is, I believe, Mr. Patton, and he is the one that told me about the wild horse in the market.' "

The fact that a runaway horse in the course of a long flight may have reduced his speed to a trot is very slight evidence on which to predicate his gentle character. If he had been a gentle, tractable animal, his owner and his driver would probably have so testified. In leaving the horse standing in the street, the driver violated the city ordinance reading as follows: "That all drivers of vehicles in the city of New Orleans are expressly forbidden to leave their seats or quit hold of

their reins under a penalty of a fine of ten dollars for each contravention."

By the same ordinance every hack, cart, or vehicle standing on the streets is required to have "lamps" and shall keep them lighted when employed or running at night. There was one lantern or lamp on defendant's cart, and this was jolted off prior to the collision.

In *Zambelli v. Johnson & Son Co.*, 39 South. 501, 115 La. 483, this court held that: "It is negligence for the driver of a team of horses to abandon his seat upon the box and his hold upon the reins, and to leave his team standing in a frequented place, and where it appears probable that they might have been controlled if he had been in the proper position to control them, his employer will be held liable in damages for injury inflicted by them upon a third person in running away."

The law is "that the owner of an animal is answerable for damages he has caused" (Civ. Code, art. 2321); and the presumption is that the owner of the animal is in fault, and the burden is on him to show that he was without the slightest fault and did all that was possible to prevent the injury: *Bentz v. Page*, 115 La. 560, 39 South. 599. There can be no escape from the conclusion that the driver was in fault in leaving the horse loose in the street while he was chasing his hat.

The judge in quo held that the driver was not negligent, and on the question of contributory negligence, says: ⁵³⁴ "Here was a motorman traveling at full rate of speed on a very dark night, at a spot where every electric light was out. We believe he was unquestionably reckless."

The schedule required a speed of about a mile in five minutes, but, of course, the speed was not uniform. The car had to make "slow-ups," and had to go more slowly around curves. In answer to a question as to the rate of speed at the time of the accident, the conductor said: "About eight miles an hour. Given full power, the car does not take up speed until she runs four blocks. There was a bend; we went slow there."

The existence and location of this bend or curve is not disputed. The motorman said that the car was going at full speed, but that he did not know the rate, as some cars have more speed than others. It was the duty of the motorman to run his car according to schedule time, and there is nothing to show that the prescribed rate was exceeded on the occasion in question, or that the schedule, as fixed, violated any police law or ordinance. The accident happened at 3:35 o'clock in the

morning, when the town was asleep, and the danger of collision with persons or vehicles was at the minimum. The collision took place ninety feet from the crossing, and the affirmative evidence shows that the motorman did all he could to avoid the injury. The horse and wagon came rapidly up the track, and, when they became visible to the motorneer, were not more than forty feet from the car. There was no light on the wagon, and it was impossible for the motorneer to have seen the danger in time to avoid the accident. The conclusion of the district judge is based on the predicate that the motorneer should have foreseen that some horse and wagon, without a driver or lights, might come tearing up the track at a place where the electric lights were out.

In *Gallaher v. Crescent City R. R. Co.*, 37 La. Ann. 288, Bermudez, C. J., said: ⁵³⁵ "In the case of *Hearn v. St. Charles St. Ry. Co.*, 34 La. Ann. 160, this court held that the driver [of a street-car] can be justly charged with negligence only when he fails to observe something he ought to see, and would see, with ordinary vigilance, when he fails to be prepared for something visible, or at least of probable occurrence or that might be reasonably expected to happen."

Thompson on Negligence, volume 1, page 382, says: "Moreover, it is a sound view that a person is not chargeable with contributory negligence in not anticipating that other persons will be negligent or will violate the law, and in not providing against such possible violations of it."

We do not think that the motorman was required to anticipate such a danger as a runaway horse and wagon, without a driver, and without lights, in the darkest hour of the night, rushing unexpectedly toward him.

There is nothing in the evidence to justify the conclusion that the motorman jumped from the car at the moment of the collision. If he had done so in order to save himself, the legal situation would not be changed.

The vestibule of the car was practically wrecked by the collision. One of the shafts of the wagon was driven through the vestibule and the front of the car. The wagon landed on the top of the platform, and the horse hung suspended by the harness. The front controller was bent or crushed back. The motorman was struck by something, and knocked off unconscious. He says: "When I came to my right senses, I found myself in the street three feet from the gutter. I got up and fell back into the mud. I looked down the street. I

called my conductor, 'For God's sake, come help me!' He came to my assistance, and he asked me if I was hurt, and I told him I thought my foot was broken."

That as a result of the collision the plaintiff was hurled from the car and severely injured in his left foot is beyond dispute. He was confined to his bed for six weeks, was on crutches for some time, and returned to his work on June 3, 1905. Of course, the plaintiff suffered pain, and, according to his testimony, could not use his injured foot ⁵³⁶ without pain down to the time of the trial in June, 1905. The condition of the plaintiff on February 14, 1905, is thus described by his attending physician: "I found that his foot had been sprained, and the shreds of the small bone of the instep had been torn. The ligaments between the bones had been torn, and the foot contused and mashed." In answer to the question whether the wound could have been the result of jumping from the car, the witness replied: "That might have been possible, so far as the sprain went; but it could not be possible as far as the contusion went. This led me to believe that it had been struck a blow, because the skin had been knocked off the foot."

The witness attended the plaintiff over a month, and was consulted about the foot down to the date of the trial, and at that time found that the condition of that member "was not good." The witness could not say that the injury would prove permanent, but was of the opinion that the foot would never be as good as it was before the accident, as a sprained joint is never as good as it was before. He further testified that the plaintiff suffered a great deal; that his foot was swollen for at least six weeks, during which time the plaintiff had to lie flat on his back and keep the foot elevated all the time; and that plaintiff could not use his foot at all. The witness advised the plaintiff to give up his job of motorman and find something else to do that would not necessitate his standing on his foot. This advice the plaintiff did not follow, and the witness was of opinion that the failure to do so aggravated the original injury, as absolute rest was necessary to effect a cure; but the witness did not think that the plaintiff would have been perfectly cured even if the advice had been followed. The plaintiff testified that he tried, but could not get any other job, and that he had to work or starve. Plaintiff has been pursuing his work as a motorman since June, 1905, ⁵³⁷ and has lost in all about five and a half months' time. He testified that his foot still pained him when at work.

Considering plaintiff's pain and suffering, loss of time, medical expenses, and the impairment, although temporary, of the free use of his foot, we think an allowance of fifteen hundred dollars, as damages, is reasonable.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that the plaintiff, Charles A. Damonte, do have and recover of the defendant, Oliver Patton, the full sum of fifteen hundred dollars, with legal interest from the date of this decree, and all costs of suit in both courts.

When a team of horses is found running away, unattended, on a public highway, and doing damage to one lawfully thereon, negligence is by some authorities held prima facie imputable to the owner: Gorsuch v. Swan, 109 Tenn. 36, 97 Am. St. Rep. 836, and see the cases cited in the cross-reference-note thereto. It has been held not negligence per se to leave a quiet, gentle horse untied and unattended on the street: Belles v. Kellner, 67 N. J. L. 255, 91 Am. St. Rep. 429. The owner of a team of vicious and "runaway" horses is said to be liable for injuries inflicted by them, without proof of negligence or fault in endeavoring to prevent the injury: Lynch v. Kineth, 36 Wash. 368, 104 Am. St. Rep. 958.

BRITT v. DAVIS BROTHERS.

[118 La. 597, 43 South. 248.]

CONTRACTS—Gaming—Illegal Employment—Recovery of Salary.—A manager of a gambling-house employed by the year and discharged before the expiration of his term, without cause, cannot recover a share of the profits of the establishment which he was to have received in lieu of salary. (p. 391.)

Fullilove & Mills, for the appellant.

S. L. Herold, for the appellees.

598 MONROE, J. Plaintiff alleges that he was employed to manage a cardroom, maintained in the rear of defendant's barroom in Shreveport, and to supervise and wait on games of poker played there, furnish the players with cards, chips, etc., and see that they paid for the use of the conveniences so furnished, and that he was to get one-half the net profits in lieu of salary; that his employment was by the year, but that he was discharged without cause at the end of ten weeks, and is entitled to recover five thousand two hundred and sixteen dol-

lars and forty cents as the amount that he would have made during the remainder of the year. The suit was dismissed upon an exception of "no cause of action," and, we think, properly dismissed. The object of the contract was the maintenance of an establishment for the indulgence of a vice, denounced as such by the constitution of the state. The contract was, therefore, morally impossible, and void, and no damages can be recovered for its nonfulfillment: Civ. Code, arts. 1891-1893, 1895. The fact that plaintiff was not obliged by his agreement to participate in the games may have been to his advantage in some respects, but it doth not improve his standing in court: *Cummings v. Saux*, 30 La. Ann. 207; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258, 6 L. ed. 468.

Judgment affirmed.

Contracts Founded upon a Gaming Consideration will not be enforced by the courts: *Kuhl v. Gally Universal Press Co.*, 123 Ala. 452, 82 Am. St. Rep. 135; *Pritchett v. Aherns*, 26 Ind. App. 56, 84 Am. St. Rep. 274; *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693. The validity of contracts, the consideration of which is partly illegal, is the subject of a note to *State v. Wilson*, 117 Am. St. Rep. 493. The rule of *pari delicto* is the subject of a note to *Hobbs v. Boatright*, 113 Am. St. Rep. 724. And accounting by an illegal partnership is the subject of a note to *Central etc. Safe Deposit Co. v. Respass*, 99 Am. St. Rep. 326.

LYNCH v. KNOOP.

[118 La. 611, 43 South. 252.]

MARRIAGE—Proof of—Legitimacy of Child.—In an action to recover for the wrongful death of a child, where the defendant denies the legitimacy of such child and tenders an issue requiring proof of the marriage, the plaintiff must, in order to recover, produce evidence of her marriage. (p. 393.)

MARRIAGE—Proof of—Legitimacy of Child.—In the absence of all proof of marriage, and in the face of an absolute denial by defendant, the legitimacy of a child will not be presumed, where one of the parties to the suit is a party to such asserted marriage and makes no attempt to prove it. (pp. 393, 394.)

MARRIAGE—Proof of—Legitimacy of Child.—Although the maternity of a child is recognized after its wrongful death, the child is not thereby legitimated so as to enable the mother to recover for such wrongful death without proof of her marriage, when such marriage and the legitimacy of the child are denied by the defendant. (p. 394.)

NEGLIGENCE—Death by Wrongful Act.—A natural mother cannot recover for the death of her natural child caused by wrongful act. (p. 395.)

NEGLIGENCE, CONTRIBUTORY—Injury to Child.—The owner of lumber piled upon a river bank in the usual way is not liable, in the absence of negligence on his part, for an injury to a bright and intelligent child, eight years of age, who unnecessarily and without invitation exposes herself to accident by playing upon such lumber. (p. 397.)

F. McGloin, for the appellant.

Dinkenspiel, Hart & Davey, for the appellee.

612 BREAU, C. J. This suit was brought to recover damages in the sum of ten thousand dollars for injuries which resulted in the death of plaintiff's child, caused by a fall of lumber of defendant, which had been stacked on the banks of the New Basin Canal in this city.

Plaintiff's complaint is that on an afternoon in October, 1903, while she was passing on the highway, her little girl stepped alongside of the lumber pile before mentioned, and was knocked down by lumber which fell and injured the child, causing her death in about twenty-four hours afterward. She charges that defendant's negligence and carelessness was the cause of the death of her child.

Defendant by way of exception, pleaded that plaintiff disclosed no cause of action. In the answer defendant reserved his exception, and thereafter denied that plaintiff was married to William Garrett, and alleged that she never was his wife; that Esther Garrett, the little girl who was injured and died from the injuries, was not the legitimate issue of a marriage between William Garrett and plaintiff. The plea of general denial was filed, and defendant further urged on the merits that both plaintiff and her little daughter were negligent, and by their own negligence brought on the casualty.

The judge of the district court condemned **613** the defendant to pay fifteen hundred dollars to plaintiff. From this decision the defendant appealed.

The legitimacy vel non of plaintiff's daughter is the first issue that presents itself.

Plaintiff was unquestionably the mother of the child. The defendant did not especially attempt to prove that there was no marriage between plaintiff and William Garrett further than to introduce the certificate of marriage between plaintiff and her present husband, and the copy of another solemn act,

which was a confirmation at the church before a priest of the marriage with Lynch, celebrated before a justice of the peace. She signed each of these acts as "Miss Rose Duffy."

Plaintiff has not testified at all in the case, and no attempt was made to explain why these acts were signed as just mentioned. If it was a mere oversight or signed in the way that it was for any particular reason, it was not explained.

Defendant rested his case on this point on that evidence, and took the position that the onus of proof to show marriage was with the plaintiff; while, on the other hand, the plaintiff appears equally as confident that the onus of proof that she was not married was with the defendant.

In our view, the onus of proof was with the plaintiff. It devolved upon her, in order to meet the issue tendered, to produce evidence of her marriage. In the absence of all proof of marriage, in the face of an absolute denial, the legitimacy of a child will not be presumed where one of the parties to the asserted marriage is a party to the suit and makes no attempt to prove the marriage.

True, the legitimacy of a child born during the marriage is fixed, but it is otherwise if there was no marriage, and parties entirely fail to prove marriage.

In *Castagnie v. Bouliris*, 43 La. Ann. 943, 10 South. 1, plaintiffs in a petitory action were opposed by defendant's plea of illegitimacy ⁶¹⁴ on the ground that plaintiffs were not the issue of any marriage. The court held in that case that it devolved upon the plaintiffs to prove a marriage in order to fix their status as heirs. Having failed in this, their claim was rejected. The same was substantially the ruling in the *Fletcher Succession*, 11 La. Ann. 59.

It was also decided in another case that the plaintiff who sought to prove that property belonged to a community (to which it was claimed that it belonged) should establish the marriage as conclusively as any other fact: *McConnell v. City of New Orleans*, 15 La. Ann. 410.

The court in *Jackson v. Illinois R. R. Co.*, 46 La. Ann. 226, 14 South. 514, said: "The testimony as to the marriage, . . . particularly on a special denial of that fact in defendant's answer, is entirely too weak to justify judgment."

To the same effect is *Albinest v. Yazoo & M. R. R.*, 107 La. 133, 31 South. 675.

The burden of proof was with the plaintiff particularly as she signed two solemn acts in her maiden name; one at the

time she was married to her present husband, and the other a short time afterward.

There is a difference between a child born out of wedlock, and one born during marriage. In regard to the former, the allegation that he was born out of wedlock under the circumstances here puts the burden upon him of proving his birth during marriage, as the presumption of legitimacy arises only regarding the child born during marriage.

In this state, marriage is a formal declaration or contract by which act a man and woman join in wedlock. It must be in writing. The spouses are not ignorant of the place where the marriage was celebrated, and it should always be possible to produce a copy, or account for its absence.

The proof of marriage is relaxed as to third persons in certain contingency. But as to the spouses there is no reason why either of ⁶¹⁵ them should not easily prove the fact of marriage. The marriage of plaintiff to William Garrett, if there was a marriage, surely could have been easily proven, as it was not of an ancient date.

If one of the parties chooses not to recognize a former marriage, there can be no remedy for the omission. There is no evidence here sufficient to enable the court to pronounce a decree recognizing a marriage.

We leave the question of marriage and take up the next issue presented in the case.

In her petition, the mother declared to the court that her child had been killed.

If the maternity of a child may be acknowledged after the death of the child, it remains that, considered as a child acknowledged, she was not thereby legitimated. Even if the child has been acknowledged, the mother is not entitled to stand in judgment. A child must have been legitimated in order that the mother may stand in judgment. Was the child legitimated? It was not. Our reasons are the following:

The right of action, under Act No. 71, page 94, of 1884, survives in the surviving mother and father. "The right of this action shall survive in case of death in favor of the minor children."

This does not include the natural mother and the natural father.

The articles of the Civil Code regarding the mother of legitimate children all refer to a lawful mother. The article of the

code relating to natural mothers and natural fathers is separate from those relating to the lawful mother and father.

The two, the mother and the natural mother, are treated in the code differently or from a different point of view; one from the point of view that she has a natural right, the other that it is a statutory right extending no further than the terms of the statute.

The following are some of the marked differences between the natural child and the ⁶¹⁶ legitimate child: The natural heir is to be recognized and to be placed in possession under special provisions of the law. He is a stranger to the succession from which he inherits until permission is obtained to exercise the right of an heir. It is different with the legitimate heir.

Originally, the right to damages for personal injuries was not heritable. The statute has to some extent made it heritable, but it does not express the intention to include the natural mother as a person in whom the right survives, and without some expressed declaration in that respect, it cannot be considered as secured under the terms of the statute. The terms of the act cannot be extended so as to include a natural mother or a natural offspring.

Legitimate relationship was the legislative intent.

The right does not survive in the mother further than it does in the natural child: Civ. Code, art. 3556, No. 8.

Natural children, though recognized, are not children properly called. The same is a logical conclusion as relates to the mother of the natural child. While she is the mother properly so called, she inherits from the natural child under the special provisions of our code: Arts. 212, 256, 261.

But this can afford no comfort to the plaintiff, for the right of inheritance is special and embraces only such rights as are in themselves heritable. The statute does not enlarge the rights of a natural mother or the mother of a natural child, and did not add to their number or extent. It only provided for the survival of certain designated rights, and as thus designated it includes the mother, and not the mother of the natural child.

Learned counsel for plaintiff places great reliance in *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179. We have considered the decision, in which it seems contrary views were entertained and ⁶¹⁷ expressed. The contention states that the statute of Missouri is the same in every respect as ours—a

statement which we accept as correct. True, the statute of Missouri as interpreted by her courts is the law of that state, but it goes no further. It is persuasive not to a greater extent, however, than the decisions in other jurisdictions interpreting an independent statute without regard to prior laws and prior jurisprudence in the state in which the statute has been adopted.

The courts of other states, as relates to a statute in itself, without reference to the laws and jurisprudence, are equally as competent to arrive at a correct solution. Moreover, the decision *supra* seems to stand alone.

We find contrary views to it in the following: 5 Am. & Eng. Ency. of Law, pp. 1095, 1096; 8 Am. & Eng. Ency. of Law, p. 895, No. 2, note 3. See, also, 2 Words and Phrases, pp. 1117, 1120, 1123, 1135; Verbo, "Legitimate Children"; Tiffany on Death by Wrongful Act, sec. 85, note 15; Black on Law and Practice in Accident Cases, sec. 109, note 3.

A different view than is expressed in the Missouri case is expressed in *Robinson v. Georgia R. R. Co.*, 117 Ga. 168, 97 Am. St. Rep. 156, 43 S. E. 452, 60 L. R. A. 555. Also *Alabama etc. R. R. Co. v. Williams*, 78 Miss. 209, 84 Am. St. Rep. 624, 28 South. 853, 51 L. R. A. 836; *Illinois etc. R. R. v. Johnson*, 77 Miss. 727, 28 South. 753, 51 L. R. A. 837; *McDonald v. Pittsburgh C. C. & Ry. Co.*, 144 Ind. 159, 55 Am. St. Rep. 185, 43 N. E. 447, 32 L. R. A. 309.

"Child," used in the statute, means legitimate child: *McDonald v. Southern R. R.*, 71 S. C. 352, 110 Am. St. Rep. 576, 51 S. E. 138, 2 L. R. A., N. S., 640 (1905), 13 Cyc. 337.

We have extended our examination into the merits of the case. We have not found that plaintiff's demand is sustained by the testimony.

⁶¹⁸ She has not made out her claim with legal certainty. Her children, with the young daughter of the neighbor, instead of following the street and going where they had been sent, stopped and went up on the lumber pile, stepping for their amusement from one board to another. They were on the lumber in invitum. Attempt had been made to make them go away. They were seen on the lumber a short time before the accident.

The New Basin bank is a public landing place that is in charge of the harbor-master of the board of control: Act No. 144, p. 199, of 1888. The lumber was placed on the bank of the canal by the workmen of the schooner. It was piled up

to the usual height; that is, three and four feet. The owner could not inclose the lumber, as it was a public place. The whole was open and apparent. The lumber was piled in the usual way. It does not appear that there was negligence on the part of the owner. He had no reason to suspect that children would jump on the lumber and displace pieces of the lumber. It was not such as to attract children and excite their curiosity. Under the circumstances he is not liable: *Mayronne v. Keegan*, 117 La. 212, 42 South. 212.

The owner of freight is not liable if persons unnecessarily expose themselves to accident.

The child who met her death was bright and intelligent. We have seen that she was eight years old, and old enough to fall within the rule of contributory negligence: *Westerfield v. Levis*, 43 La. Ann. 63, 9 South. 52. The child was sui juris as relates to negligence and the condition under which she met with the accident. Moreover, she had been confided by her mother to an older sister, who was about thirteen years of age. The little party, in leaving the street as they did, and going on the lumber ⁶¹⁹ pile and moving some of the pieces, are not without blame. Some of the pieces fell over and fatally wounded the little girl. The lumber was in the usual place, and it does not appear that defendant was negligent in regard to it. The little girl who should have been a protection to her sister led the way to the place of danger.

Under the rules which allow relief for personal injury, we do not think that plaintiff can possibly recover. It does not afford protection to those who so imprudently expose themselves. The proximate cause was the imprudence before mentioned. It follows from the foregoing that on these grounds also plaintiff cannot recover.

It is therefore ordered, adjudged and decreed that the judgment appealed from is avoided, annulled and reversed.

It is further ordered, adjudged and decreed, that there be judgment in this court for defendant against plaintiff; that plaintiff's petition be dismissed, and her demand rejected, at her costs in both courts.

The Mother of an Illegitimate Child has been denied the right to maintain an action for the wrongful death of the child: *McDonald v. Southern Ry. Co.*, 71 S. C. 352, 110 Am. St. Rep. 576, and cases cited in the cross-reference note thereto.

Children Born of a Married Woman are presumed legitimate: *Scanlon v. Walshe*, 81 Md. 118, 48 Am. St. Rep. 488; *Zachmann v. Zach-*

mann, 201 Ill. 380, 94 Am. St. Rep. 180; note to *Babeke v. Baer*, 69 Am. St. Rep. 571. And when a marriage is shown, the law raises a strong presumption of its validity: See the note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198.

A Property Owner is Generally not Liable to Children for injuries sustained by them while trespassing upon his premises: *Fitzmaurice v. Connecticut Ry. etc. Co.*, 78 Conn. 406, 112 Am. St. Rep. 159; *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847; *Friedman v. Snare*, 71 N. J. L. 605, 108 Am. St. Rep. 764; note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

KLINGEL'S PHARMACY v. SHARP & DOHME.

[104 Md. 218, 64 Atl. 1029.]

RESTRAINT OF TRADE—Combination and Conspiracy.—A complaint charging an unlawful conspiracy by certain dealers in drugs to exact and maintain a maximum schedule of prices for drugs and druggists' supplies, in restraint of trade, and that because plaintiff will not enter into such combination and conspiracy no drugs or supplies have been or will be sold to it by the defendants, and that no other dealer in such articles is, or will be, allowed to sell to it without incurring the penalty of being blacklisted and boycotted as threatened by the defendants, which action by defendants is not taken in the bona fide exercise of their right to sell or to refuse to sell to whom they please, but is taken with a malicious intent to injure and destroy the business of plaintiff, whereby it has been wholly deprived of the ability to purchase supplies, though ready to pay the prices asked, and as a result has been prevented from pursuing its lawful avocation, and has been injured in its business, states a good cause of action for the damages suffered. (p. 402.)

RESTRAINT OF TRADE—Combinations.—If the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to an unlawful restraint of trade in such commodity, even though contracts to buy it at the enhanced price are constantly being made. Total suppression of the trade in the commodity is not necessary to render the combination one in restraint of trade. (p. 403.)

RESTRAINT OF TRADE—Conspiracy.—A combination in restraint of trade is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief. (p. 403.)

RESTRAINT OF TRADE—Conspiracy—Right of Action.—An action will lie for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business, resulting in damage. (p. 404.)

CONSPIRACY.—Threats Coupled With Damage necessarily flowing therefrom in the prosecution of a conspiracy to do an unlawful act are sufficient to constitute a good cause of action. (p. 409.)

J. P. Poe and N. I. Gressitt, for the appellant.

V. Cook, C. Markell, Jr., Gans & Haman and G. A. Solter, for the appellees.

227 McSHERRY, C. J. The question now before us is merely one of pleading, and involves only the sufficiency of the averments of the declaration. To the declaration, the defendants demurred and the superior court of Baltimore City sustained the demurrer and entered judgment for the defendants for costs, and from that judgment this appeal was taken. In order to determine whether the ruling of the superior court was correct, it will be necessary to set forth with some fullness the allegations of the declaration; and the objections which have been urged against its legal sufficiency will then be stated and considered.

The declaration avers that Klingel's Pharmacy of Baltimore City, the plaintiff, is a duly licensed incorporated retail vender of drugs and druggists' supplies; that it was and still is, able, ready and willing to pay cash for all kinds of drugs and druggists' supplies needed by it and suitable for the proper conducting of said business. That the defendants, the Calvert Drug Company, and Sharp & Dohme, are corporations which have been for some time, and still are, engaged in the business of selling drugs and druggists' supplies. That the other defendant, the Baltimore Retail Drug Association, is a corporation formed and organized for the purpose, amongst other things, of unlawfully maintaining amongst dealers in drugs and druggists' supplies, the maximum rate schedule of prices and of preventing, in restraint of trade, all venders of drugs and druggists' supplies, who are unwilling to acquiesce in and submit to the prices so fixed by it, from buying at any price the drugs and druggists' supplies needed and desired by them in their business, by the unlawful coercion of threats that any and all venders of drugs and druggists' supplies who shall sell for less than the schedule prices shall be themselves black-listed and all sales of drugs and druggists' supplies be refused them; and that all the members of said Retail Drug Association are bound by an agreement not to sell such supplies to any person **228** or corporation who will not agree to maintain its maximum schedule of prices. That the plaintiff has steadily

refused to become a member of said Baltimore Retail Drug Association, or to unite with it and with its members and with the other named defendants in said combination and conspiracy to coerce the dealers in drugs and druggists' supplies to maintain said established prices by refusing to sell to them and by threats that unless they shall so maintain the same they shall be boycotted and placed on the blacklist and be disabled from buying any drugs and druggists' supplies whatever. That though the plaintiff has repeatedly applied to the Calvert Drug Company, and to Sharp & Dohme, and to sundry other druggists to sell to it drugs and druggists' supplies, tendering itself ready, able and willing to pay cash, yet the said defendants and said other druggists have refused to sell it drugs or druggists' supplies, at any price whatsoever, because of said unlawful conspiracy and combination, coupled with the threat that for any violation of such unlawful combination and conspiracy the parties violating it should themselves be blacklisted, and all sales be refused to them. That the avowed object of the conspiracy was, and is, to maintain in restraint of trade a maximum price of drugs and druggists' supplies, and to compel the plaintiff to become a member of said combination, and to agree to charge all its customers such maximum price, or be driven out of business. That the Retail Drug Association is wholly composed in its membership of such venders, and that the entire power of the association and of its members is unlawfully exerted to coerce, by blacklisting, and by potent and effective threats of boycotting, the illegal purposes and acts aforesaid. That the wrongful refusal of the Calvert Drug Company and of Sharp & Dohme, and of other parties, to sell to the plaintiff, was, and is, the direct result exclusively of said unlawful combination and conspiracy, and of the wrongful actings and doings of said Retail Drug Association in carrying out the unlawful object and purpose of said conspiracy. That the action of the defendants is not an action taken by them in the bona fide exercise of their supposed right to sell or to refuse to sell to whomsoever ²²⁹ they please, nor in the bona fide exercise of their supposed right to advise other venders as to selling or not selling their drugs and druggists' supplies; but, on the contrary, that by the said combination and conspiracy, the defendants did wrongfully and maliciously intend to injure and destroy the plaintiff's business, which they have succeeded in doing, and that such injury to the business of the plaintiff

is the direct result of said illegal, malicious and wrongful conspiracy, and of the acts done in furtherance thereof.

Here, then, it is distinctly charged that there is an unlawful conspiracy to exact and to maintain a maximum schedule of prices for drugs and druggists' supplies in restraint of trade; and it is with equal directness alleged that because the plaintiff will not enter into that combination and conspiracy, no drugs or supplies have been or will be sold to it by the defendants; and that no other dealer in those articles is or will be allowed to sell to it without incurring the penalty of being blacklisted and boycotted as threatened by the defendants, which action of the defendants was not taken in the bona fide exercise of their right to sell or to refuse to sell to whom they pleased, but was taken with a malicious intent to injure and destroy the business of the plaintiff, whereby the plaintiff has been wholly deprived of the ability to purchase supplies and has, as a result, been prevented from pursuing its lawful avocation. By sustaining the demurrer, the superior court held that these facts, if true, did not constitute a valid cause of action. We are not apprised by the record as to the ground upon which the trial judge based his decision; but the reasons assigned in the brief of the appellees to sustain that ruling are, first, because (a) an agreement or conspiracy not to sell to the plaintiff is not actionable; and, because (b) no facts are alleged that amount to unlawful coercion by the defendants to the damage of the plaintiff. Secondly, because the declaration is bad for misjoinder. These grounds are not tenable, as we shall see in a moment. They have been assumed obviously in consequence of a misinterpretation of the averments of the narratio.

²³⁰ In the last analysis it will be seen that there are three salient facts averred in the declaration: First: A combination to exact and maintain a maximum schedule of prices for drugs and druggists' supplies is asserted to exist between the defendants and others in restraint of trade. That combination, if it does exist, and we are bound to assume that it does when dealing with the issue raised by the demurrer, is a criminal conspiracy at the common law, and is punishable by fine and imprisonment after indictment and conviction. It is the offense of forestalling the market, and is defined to be every practice or device by act, word or news, to enhance the price of victuals or other merchandise: Roscoe on Evidence, 437; 3 Institutes, 196; 3 Bacon's Abridgment, 261; 1 Russ. 169. As it creates a

monopoly, it was held to be unlawful at the common law as being in restraint of trade and against public policy: *Mitchel v. Reynolds*, 1 P. Wms. 181. The English statutes on this subject, which were merely declaratory of the common law, were repealed by 7 and 8 Victoria, chapter 24. In the United States, whilst we hear little now about forestalling, engrossing or regrating, we hear much of "corners" and "trusts" which are, in many instances, the old offenses under new names, since they are frequently attempts by a combination or conspiracy of persons to monopolize an article of trade or commerce and so to enhance its price. Where the direct and immediate effects of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are constantly being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade: *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44 L. ed. 136. Though this was said by the supreme court in a case which arose under the anti-trust act of Congress of July 2, 1890, it equally applies to combinations and conspiracies of the character described in the declaration set forth in ²³¹ the record now before us. A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief; and the same proposition, in one form of expression or another, is laid down in all the criminal law: *Bishop's Criminal Law*, sec. 172; *Desty on Criminal Law*, sec. 2; 3 *Chitty on Criminal Law*, sec. 1138; *Archibold's Criminal Practice*, 1830. A "corner" when accomplished by confederation, to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful: *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159; *People v. Melvil*, 2 Wheel. C. C. 262; *People v. North River Sugar Refining Co.*, 54 Hun, 354, 3 N. Y. Supp. 401, 2 L. R. A. 33, and notes. In *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184, it was ruled that an action will lie for a combination or

conspiracy by fraudulent and malicious acts, to drive a trader out of business, resulting in damage.

The cases of *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340, and *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411, decide nothing at variance with the principles just stated. They hold that an act which does not constitute a cause of action when done by one person does not become actionable merely because it has been done by conspirators; that an unlawful combination to do an act, which, if done, would injure another, does not of itself, and without more, furnish a ground for a civil suit; and finally, as a corollary to the previous proposition, that though a conspiracy to do an injury exists, a plaintiff cannot recover against the conspirators unless some act has been done in furtherance of the conspiracy which has resulted in damage to him. "The quality of the act and the nature of the injury inflicted by it must determine the question whether the action will lie": *Kimball v. Harmon*, 34 Md. 407, 6 Am. Rep. 340. Having described a combination which at the common law is a criminal conspiracy, the declaration proceeds to set forth the acts done in execution of the unlawful conspiracy, and to aver that they were maliciously done and then to allege the injury resulting therefrom.

²³² The second salient fact averred in the narratio consists of a statement of the acts done in furtherance of the conspiracy. Those acts are twofold: First, a refusal by the defendants to sell to the plaintiff—an act they would have the legal right to do, if when done it were not done in the execution of and to carry into effect a criminal conspiracy in restraint of trade. And secondly, coercion and intimidation practiced by the defendants upon other venders of like commodities, by means of threats to blacklist and to boycott such venders, if they sold to the plaintiff any drugs or druggists' supplies, whereby they were deterred from selling those articles to the plaintiff, unless it joined the association.

"It is a part of every man's legal rights," said Judge Cooley, "that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice": *Cooley on Torts*, 278. Again: "The exercise by one man of his legal right cannot be a legal wrong to another. . . . Whatever one has a legal right to do another can have no right to complain of": *Cooley on Torts*, 688. It was upon this principle that the decision in *Bohn Mfg. Co. v. Hollis*,

54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, 21 L. R. A. 337, was placed. In that case a large number of retail lumber dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and they provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale, the secretary of the association should notify all members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact to all the members of the association; and it was held that no action would lie, and that there was no ground for an injunction. There was nothing unlawful in this. Each member of the association had the legal right to refuse to sell the lumber which he owned, if he saw fit to refuse, and the collective refusal of all the members was equally lawful. So, too, ²³⁸ the defendants in this case had a perfect legal right to refuse to sell to the plaintiff any drugs and druggists' supplies owned by them; and it would have been wholly immaterial whether that refusal was the result of whim, caprice, prejudice or malice, if the bare refusal to sell had been the head and front of their offending. But the refusal to sell was not the exercise of a legal right, if that refusal were a mere step in the development and enforcement of a scheme to forestall the market in restraint of trade, or to drive the plaintiff into becoming a member of an organization which would control the prices he could charge for his wares, and which would thereby deprive him of the liberty to contract for the sale of his goods according to his own judgment of their value. Whilst an act which is in itself lawful can never become unlawful simply because it may be done by several persons instead of by only one, yet the same act may be unlawful when it is a means of accomplishing an unlawful end. An act performed in furthering an unlawful enterprise cannot be a lawful act, though the same act would be free from censure if done with some other view. If it be conceded that a person has the lawful right to do a thing irrespective of his motive for doing it, the proposition that an act lawful in itself is not converted by a bad motive into an unlawful act, is a mere abstract truism. But if the meaning of the proposition is that when a person or an aggregation of persons, if influenced by one kind of

motive, has a lawful right to do a thing, the act is still lawful when done with any motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, then the proposition is neither logically nor legally accurate. In so far as a right is absolutely and unqualifiedly lawful it is lawful whatever may be the motive of the actor; but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and the motive combined: *Plant v. Woods*, ²³⁴ 176 Mass. 492, 79 Am. St. Rep. 330, 51 N. E. 1011, 51 L. R. A. 339. The intent or knowledge with which an act is done may make a lawful act unlawful. It is no offense to receive stolen goods; it is an offense to receive them knowing them to be stolen. The act of receiving the goods is identically the same in each instance. In the one case it is lawful; in the other, the same act is unlawful because the scienter makes it so. To utter forged paper is no offense, but to utter it knowing it to be forged is criminal. It is the same act in each instance, but it is lawful or unlawful according to the absence or the presence of a guilty knowledge. Hence it is fallacious to say that an act which is lawful can never become unlawful; and equally fallacious to say that though it is lawful for a person to refuse to sell to another, it is also lawful for the same person in combination with others to likewise refuse to sell when such refusal forms part of a scheme to raise and maintain the price of commodities in restraint of trade, and is not the bona fide exercise of their right to refuse to sell.

The declaration goes a step further, and charges that the defendants coerced other venders of drugs and druggists' supplies to abstain from selling those articles to the plaintiff, and that they did this by means of threats of blacklisting and boycotting such venders if they should sell to the plaintiff whilst it was not a member of that combination, by reason of which threats those venders were intimidated and were deterred from selling to the plaintiff. The plain meaning of all this is, the defendants notified the plaintiff that unless it entered into the union or combination, and charged the same prices which other members thereof were required to charge, the defendants would, by threats of coercion, by

blacklisting and by boycotting other dealers, deprive the plaintiff of the ability to carry on its lawful business. Is such an interference with the legal right of an individual to conduct a lawful business in a lawful way tolerated by the law? And can it be permitted to flourish unscathed because no open deeds of violence or breaches of the peace have been committed? It would be a reproach to the law if such were the case. A boycott means the confederation,²³⁵ generally secret, by many persons whose intent is to injure another by preventing all persons from doing business with him through fear of incurring the displeasure, persecution and vengeance of the conspirators: 8 Cyc. 639. The courts have generally condemned those combinations which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them by means of threats and intimidations of the right to conduct the business in which they are engaged according to the dictates of their own judgment: *My Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752. Whilst an owner of property has the legal right to refuse to sell it to another, and whilst, as in the case of *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, 21 L. R. A. 337, several owners may unite to do the same thing, just as laborers may organize to improve their condition and to secure better wages, and in fact may refuse to work unless such better wages are obtained, still the law does not permit either an employer or employé to use force, violence, threats of force or threats of violence, intimidation or coercion to secure these ends (*My Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752), nor does it permit venders to resort, with impunity, to the like means to force or compel others engaged in the same business to abandon their own method of conducting a lawful business in a lawful way. In *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534, it was held that a conspiracy by a number of persons that they will, by threats and strikes, deprive a mechanic of the right to work for others because he does not join a particular union would be restrained. The case at bar involves no right of labor, but the principles which have upheld the jurisdiction of courts to intervene to prevent injury and loss that would result to both employer and employé if a threatened strike or boycott were not prevented, are broad enough to include the situation presented

by the declaration now before us. In the case of *Plant v. Wood*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339, it was held that members of a labor union were entitled to an injunction restraining the members of another union, from which they had withdrawn, from doing acts in pursuance of a conspiracy ²³⁶ to compel their reinstatement, by appeals to their employers to induce them to rejoin and to discharge them in case of refusal, accompanied by threats intimating results detrimental to the employer's business and property in case of a failure to comply, coercive in effect upon the will, although they committed no acts of personal violence or physical injury to property, where complainants have been injured by such acts, and there is reason to believe that further proceedings of the same kind are contemplated which will result in still more injury to them. In the course of the judgment it was said: "It is true they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this." If these facts warrant a court of equity in restraining anticipated injury, why do they not furnish a sufficient ground to enable a court of law to award damages for the injury which they have actually caused? The coercive threats of blacklisting and boycotting have been as efficacious in restraining the minds of the persons upon whom they operated according to the averments of the narratio as would have been the consummated boycott itself; and the result to the plaintiff's business has been just as disastrous as though the persons who have been deterred or terrorized by these threats from selling to it had been in fact blacklisted by the defendants. The threat to boycott produced the consequences intended by the defendants as completely as an actual boycott would have done, and it is no answer for them to say that no other overt act or no act involving a breach of the peace was done to make effective their unlawful combination. The threatened boycott was successful. It deterred persons from selling to the plaintiff, and as a direct result ruined the plaintiff's business. These are the allegations of the narratio, and if proved

to be true they show an injury ²³⁷ to the plaintiff as the direct consequences of the lawless acts of an unlawful confederation, and entitle the plaintiff to recover.

The threat to injure the business of the persons who might sell to the plaintiff was just as efficacious in preventing them from doing the thing they were warned not to do, and therefore just as potent in causing damage to the plaintiff, as an actual boycott would have been. A threat is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent": Anderson's Law Dictionary. That such a threat, coupled with the damage necessarily flowing from it in the prosecution of a conspiracy to do an unlawful thing, is sufficient to constitute a good cause of action, has repeatedly been decided. The principle is stated by Mr. Addison in these words: "Injuries to property indirectly brought about by menaces, false representations or fraud create as valid a cause of action as any direct injury from force or trespass. Thus if the plaintiff's tenants have been driven away from their holdings by the menaces of the defendant, damages are recoverable for the wrong done": Addison on Torts, 20. The threats were overt acts in the scheme of the conspiracy, and were as effective in accomplishing the result intended to be attained as would have been an agency or instrument of physical force had it been resorted to.

The damages alleged to have followed the acts and conduct of the defendants are charged to be the direct and necessary results of those acts and that conduct. Every element, therefore, which is required to make out a valid cause of action is distinctly set forth in the narratio, and the demurrer should have been overruled unless there has been a misjoinder of defendants. It is insisted that the Retail Drug Association should not have been made a party; but the answer to this objection is found in the narratio itself, since by appropriate averments it charges that defendant with a complicity in, and as being the medium to execute, the various illegal acts which go to make up the cause of action.

²³⁸ Of course what has been said must be understood as applying to the case as made by the pleadings—we know nothing of or concerning the facts which a trial of the issues may elicit.

For the error committed in sustaining the demurrer the judgment will be reversed, with costs.

Judgment reversed, with costs above and below, and new trial awarded.

Unlawful Trusts and Monopolies are discussed in the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235. A combination of dealers in certain merchandise to compel another dealer therein to sell at prices fixed by it, or, upon his refusal, to prevent its members, who are purchasing customers, from selling goods to him, is opposed to public policy and void. One or all of the members of such combination may be restrained from carrying into effect the purpose of the combination: *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126. See, too, *Hunt v. Riverside Co-operative Club*, 140 Mich. 538, 112 Am. St. Rep. 420; *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 60 W. Va. 508, 116 Am. St. Rep. 901.

Boycotting is the subject of a note to *Gray v. Building Trades' Council*, 103 Am. St. Rep. 488.

STEWART v. UNITED ELECTRIC LIGHT AND POWER COMPANY.

[104 Md. 332, 65 Atl. 49.]

NEGLIGENCE CAUSING DEATH—Causes of Action for.—If one statute provides that executors and administrators may commence and prosecute any personal action whatever which the testator or intestate might have commenced, except actions for slander, and another statute declares that whenever the death of a person shall be caused by a wrongful act, the person who would have been liable in an action therefor if death had not ensued shall be liable to an action for damages, to be brought in the name of the state for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, these statutes provide for two separate and distinct causes of action arising out of a death by the same wrongful act, and neither of such actions is a substitute for the other. Both may be maintained concurrently. Under the first-named statute, a cause of action survives which the deceased himself had, and his executor or administrator is entitled to recover damages which become an asset of his estate, while the other statute creates a new cause of action which the deceased never had, and the damages recovered therein are for the benefit of his family, and form no part of the assets of his estate. (p. 415.)

H. B. Stimpson and A. Pearre, Jr., for the appellant.

G. W. Williams, W. L. Marbury and W. L. Rawls, for the appellee.

³³³ McSHERRY, C. J. This is an appeal from the superior court of Baltimore City. Mr. Redmond C. Stewart, the administrator of George W. Walters, deceased, brought suit against the United Electric Light and Power Company of Baltimore, and the Maryland Telephone and Telegraph Company to recover damages for injuries received by the decedent through the wrongful act, neglect and default of the defendants. It is alleged in the narratio that Walters was, in his lifetime, a tinner and roofer by trade, and that whilst engaged in work on the roof of a house in Baltimore he came in contact with a disused wire of the telephone company which crossed the aforesaid roof after being in touch with a charged wire of the light and power company, and that by that contact he received an electric shock which threw him to the ground and seriously injured him, from which injury, after suffering for several hours great pain and sickness, he died the same day. In consequence of the said acts of the defendants, "the said George W. Walters suffered severe mental and physical pain and great damage both in person and estate." One of the defendants pleaded not guilty, and the other demurred to the declaration. The demurrer was sustained and judgment was thereupon entered in favor of the defendants for costs. From that judgment this appeal has been taken.

The single question before us is, Did the cause of action, which, according to the averments of the narratio, accrued to the deceased in his lifetime from the alleged wrongful act and negligence of the defendants, abate when he died, or did it survive so that suit upon it might be instituted and maintained by his administrator?

At the common law the right of action arising from an alleged wrongful act and negligence of the character charged in the narratio before us would have abated upon the death of the person thus injured. It was a principle of the common law that if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom ³³⁴ the wrong was done. So fixed was this rule that it crystallized into a maxim. It was considerably altered, however, by the statute of 4 Edward III, chapter 7, *de bonis asportatis in vita testatoris*, which though in force in Maryland prior to the adoption of the act of 1798, chapter 101 (*Kennerly v. Wilson*, 1 Md. 102), has no application to this

case. Where the cause of action was founded on any malfeasance or misfeasance, was a tort, or arose ex delicto—where the declaration imputes a tort done either to the person or property of another, and the plea must be not guilty, the rule was *actio personalis moritur cum persona*: *Wheatley v. Lane*, 1 Wms. Saund. 216, note 1. But statutes have been adopted in Maryland as well as in many, if not most, of the states of the Union, and fashioned after similar enactments in England, which have materially changed the common-law rule; and the question involved on this record comes down to the inquiry as to whether the legislation of this state has abrogated that rule as it would have applied to this case; since if the rule has not been abrogated or modified it will defeat the pending action. Now, there are two distinct lines of legislation on this subject, both of which are in force, though adopted at widely different periods of time. The one, beginning with the act of 1785, chapter 80, has relation to the survival of certain personal actions instituted in the lifetime of the plaintiff, but which would have abated at the common law upon his death; the other, the act of 1852, chapter 299, almost a literal transcript of Lord Campbell's Act (9 and 10 Victoria, c. 93), gives a right of action under certain conditions to designated relatives of a deceased person, but not to his personal representatives, when death has been caused by a wrongful act or by negligence. The pending action has not been brought under the act of 1852, but we shall have occasion, later on, to allude to that statute, both with a view to elucidate or define the scope and meaning of the survival statutes by contrasting their provisions with its terms and obvious purpose, and to determine whether it be true, as insisted by the appellees, that the act of 1852 is the only existing legislation which authorizes a suit to be brought for the recovery of damages caused ³³⁵ by a wrongful or negligent act resulting in death. A brief analysis of this legislation now becomes necessary.

There has been a gradual development and growth in the legislation on this subject in Maryland. For a period extending over a little more than a century the statutes bearing upon the question concerned chiefly actions which had been instituted during the life of the parties, and provided, among other things, that in certain enumerated instances the death of the plaintiff should not abate the suit; but in 1888 a further progressive enactment was adopted. The acts of 1785,

chapter 80, section 1; 1801, chapter 74, section 38; 1815, chapter 149, section 3 (1 Dorsey's Laws, pp. 229, 463, 631); 1849, chapter 517, section 1, were brought together, condensed and codified in section 1, article 2 of the code of 1860, which reads: "No action of ejectment, waste, partition, dower, replevin, or any personal action, . . . shall abate by the death of either or any of the parties to such action; . . . this not to apply to actions for slander or for injuries to the person." Laying aside for the moment subchapter 8, section 5, of the act of 1798, chapter 101, reproduced in the code of 1860 in article 93, section 105, the provisions saving from abatement certain pending actions instituted in the lifetime of the plaintiff expressly excluded actions for slander and actions for injuries to the person. These last-named actions, therefore, abated upon the death of the plaintiff, precisely as they would have abated at the common law. But no other personal actions abated upon the death of the plaintiff, because section 1, article 2 of the code of 1860 unequivocally declared that no "personal action," except actions for slander and for injuries to the person, should abate by the death of either or any of the parties to the suit. If the pending suit had been brought by the plaintiff's intestate and thereafter the intestate had died, the suit, being "for injuries to the person," would have abated upon his death, as the law stood, upon the adoption of the code of 1860. Owing to conditions which existed at the outbreak of the Civil War, notably the arrest of citizens by military authority without legal process, the legislature at the special session of 1861, by chapter 44, now included in section 103, ~~336~~ article 93 of the code of 1904, narrowed the scope of the words "injuries to the person" contained in the exception clause of section 1, article 2 of the code of 1860, and accordingly broadened the class of personal actions which would not abate by the death of the plaintiff. This class of personal actions was still further broadened by the act of 1888, chapter 262, which forms section 25, article 75 of the code of 1888, and section 26 of the same article in the code of 1904. By that enactment it was provided that "No action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction." This saved every suit to recover damages for injuries to the person arising from

negligence or default from abating by the death of the plaintiff; but the clause added to section 24, article 75 of the code of 1888, by the adoption of that code, caused "actions for injuries to the person where the defendant dies and actions for slander" to abate. This same clause is found in section 25 of article 75 of the code of 1904, whilst the body of the section is a transcript of section 1, article 2 of the code of 1860. The effect of this legislation is to prevent an action commenced in his lifetime for the recovery of damages for personal injuries caused by negligence or default from abating by the death of the plaintiff, before final judgment. It is apparent, therefore, that the statutes thus far considered have relation only to a cause of action which the plaintiff himself had in his lifetime and upon which he had instituted suit whilst living. Hence these statutes give no new cause of action, but merely prevent a subsisting and a pending one from abating by the death of the plaintiff. That cause of action is in such instances devolved upon the executor or administrator, and when ripened into a judgment becomes an asset of the decedent for the benefit of his creditors, if he has any, or for the benefit of his legatees and distributees. Whilst this legislation relates to the nonabatement of actions actually pending when the plaintiff dies, there are other statutes which concern the right of executors³³⁷ and administrators to sue, and which have a direct bearing on the question here involved. The act of 1798, chapter 101, subchapter 8, section 5 (1 Dorsey's Laws, p. 390), transcribed in almost exact words in section 105, article 93 of the code of 1860, provided that: "Executors and administrators shall have full power and authority to commence and prosecute any personal action whatever, at law, or in equity (as the case may require), which the testator or intestate might have commenced and prosecuted, except actions of slander, and for injuries or torts done to the person, etc." This precise language is reproduced in the code of 1860 except the words "or torts"; but that omission did not change the scope of the provision in a case like this. If this section had remained unmodified, it is manifest that the administrator in this case could not have commenced the pending action, because it is an action for injuries done to the person, and such actions were not within the purview of the enactment. But a very material alteration was made by the code of 1888. By section 104 of article 93 of that codification, or section 103 of the

code of 1904, it was declared: "Executors and administrators shall have full power to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted, except actions of slander; and they shall be liable to be sued in any court of law or equity, in any action (except for slander and injuries to the person) which might have been maintained against the deceased," etc. Thus in 1888, for the first time, executors and administrators were given full power to commence suits for the recovery of damages for personal injuries sustained by their testator or intestate in his lifetime. Full power to commence such suits, except for slander and except against the executor or administrator of the person who caused the injury, must, if the terms mean anything, include such a case as this. Executors and administrators may commence and prosecute any personal action whatever which the testator or intestate might have commenced, except actions of slander. Now, the intestate could have brought a suit in his lifetime for the injuries sustained by him as set forth in the ³²⁸ narratio. And as this is not a suit for slander, nor a suit against the executor or administrator of a deceased defendant, why cannot his administrator commence and prosecute the same action? It surely needs no discussion to show that the pending case is clearly within the remedial provisions of the code of 1888 and 1904; and we doubt whether a question would have been raised to the contrary were it not for the act of 1852, chapter 299, taken from Lord Campbell's Act and found in the codes of 1860, 1888 and 1904. In the last-named code it is sections 1 and 2, article 67. The act is a familiar one, but in order that the argument may be carried along with clearness, those portions which are relevant to this investigation will now be quoted. We read in section 1 these words: "Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." Sec. 2: "Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been

so caused, and shall be brought by and in the name of the state of Maryland for the use of the persons entitled to damages; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the above-mentioned parties, in such shares as the jury by their verdict shall find and direct; provided that not more than one action shall lie for and in respect of the same subject matter of complaint, etc.” The points of difference between this statute and the provisions of the code giving to executors and administrators full power to commence and prosecute any personal action whatever which the testator or intestate might ³³⁹ have commenced and prosecuted (except actions of slander and an action where the person causing the injury is dead) are striking and marked even upon a casual comparison of the two enactments. The suits are by different persons, the damages go into different channels, and are recovered upon different grounds, and the causes of action though growing out of the same wrongful act or neglect are entirely distinct. Quite as significant as these circumstances is the further fact that the code of 1888, giving for the first time full power to administrators to commence any personal action except for slander, went into effect thirty-six years after the adoption here of Lord Campbell’s Act in 1852; and it must be presumed that the legislature intended by the provision in the code of 1888 to give a remedy for the injuries which the act of 1852 did not cover. To say that the two enactments are merely alternatives of each other ignores the genesis of this legislation, and in effect asserts that though the legislature distinctly and in definite terms prescribed how and by whom the suit should be brought under the act of 1852, still thirty-six years afterward it adopted a wholly different method by which, and designated a wholly different person by whom, the suit was to be commenced and prosecuted. The result would be either that Lord Campbell’s Act—the act of 1852—has been repealed pro tanto by the code of 1888—in which event all the suits brought under it since then have been improperly instituted—or a suit may be brought under either that act or under section 103 of article 93 of the code, in which event a race of diligence between the personal representative and the family of the deceased would determine

whether the damages recovered would go in one direction or another. Under the act of 1852 the suit must be brought in the name of the state for the use of certain equitable plaintiffs who are kindred of the deceased. Under section 103 of article 93 of the code the suit must be brought by the executor or administrator of the deceased. Under the act of 1852 the damages recoverable are such as the equitable plaintiffs have sustained by the death of the party injured; under section 103 the damages recoverable ³⁴⁰ are only such as the deceased sustained in his lifetime, and consequently exclude those which result to other persons from his death. Under the act of 1852 the damages are apportioned by the jury among the equitable plaintiffs, and belong exclusively to them and form no part of the assets of the decedent's estate; under section 103 of article 93 of the code the damages recovered go into the hands of the executor or administrator, and constitute assets of the estate. Under the act of 1852 there is no survival of a cause of action—the cause of action is created by it and is a new cause of action, and consequently one which the deceased never had; under section 103 there is a survival of a cause of action which the decedent had in his lifetime.

If, then, it be true, that there are two, separate, distinct and independent causes of action arising out of the same wrongful or negligent act, then it must follow that they may be prosecuted concurrently. We have pointed out some reasons in support of the statement that the two causes of action are separate and distinct, and we will in a moment turn to some of the adjudged cases on that subject. Of course if our view that these causes of action are separate and distinct be correct, there will be no need to consider at length several series of cases in other jurisdictions, because a few general suggestions, which will be made later on, will suffice to show that those cases do not apply when our statutes are being interpreted. It may be well to observe, in passing, that there is nothing incongruous or contrary to fixed legal principles in the assertion that the same wrongful or negligent act may give rise to two separate causes of action, if different injuries have been inflicted by it on different persons. It is the concurrence of the act and the injury resulting from it which constitutes the cause of action. As the same act may injure different individuals in different ways, there is no reason why those different individuals should not have separate remedies for the

recovery of the damages sustained by them respectively, even though those damages flow directly from the same cause. It is not the identity of the cause, but the identity of the cause and the ³⁴¹ identity of the damages, the identity of the person who has sustained damage, which precludes two recoveries.

It is the settled law of Maryland that the act of 1852 created a new cause of action. In *Tucker v. State*, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181, this court, in speaking of that statute, said: "By it the jury may give such damages as they may think proportioned to the injury resulting from such death, and not such as the injured person could have recovered if he had survived. The injury for which the equitable plaintiffs are compensated is the pecuniary loss sustained by reason of the death of the person through the wrongful act, neglect or default of the defendant. The statute, therefore, properly speaking, was not passed, as is sometimes said of it, to remove the operation of the common-law maxim, '*Actio personalis moritur cum persona*,' as it has not undertaken to keep alive an action which would otherwise die with the person, but, on the contrary, has created a new cause of action for something for which the deceased person never had, and never could have had, the right to sue—that is to say, the injury resulting from his death." This view is sustained by the great weight of the English cases which arose under Lord Campbell's Act, and that act from which ours was copied preceded the adoption of ours but six years. In *Seward v. Vera Cruz*, L. R. 10 App. Cas. 59, it was said by Lord Chancellor Selbourn: "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, '*Actio personalis moritur cum persona*.'" And Lord Blackburn, as accurately quoted by Tiffany ("*Death by Wrongful Act*"), observed in the same case: "A totally new action is given against a person who would have been responsible to the deceased if the deceased had lived—an action which, as is pointed in *Pym v. Great Northern Ry. Co.*, 4 Best & S. 396, 116 Eng. Com. L. 396, is new in its species, new in its quality, new in its principles, in every way new, and which can only be brought if there is any person answering the description of the widow, parent or child, who, under such circumstances, suffers pecuniary loss by death": Sec. 23. In *Legatte v. G. N. R. Co.*, L. R. 1 Q. B. D. 599, where the question ³⁴² involved was, Does a recovery

under Lord Campbell's Act preclude a recovery for the benefit of the estate of damages to the deceased injured person? Quain, J., said: The two actions were entirely different things: One for the loss the estate has suffered, and the other, under Lord Campbell's Act, which "enables an action to be brought in a case where it could not have been brought before that act, namely, when the man has suffered a personal injury and dies in consequence. After his death, before Lord Campbell's Act, no such action could have been maintained, because the death destroyed it. It fell with the life of the individual injured. Now, Lord Campbell's Act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. . . . I therefore feel clear upon the point that these actions are not brought in the same right, and that, therefore, the finding in one does not constitute an estoppel in the other": See, also, *Blake v. Midland Ry. Co.*, 10 Eng. L. & Eq. 437; *Pym v. G. N. Ry. Co.*, 4 Best & S. 396, 116 Eng. Com. L. 396. But it is supposed that there is some conflict in the English cases, and *Blake v. Midland Ry. Co.*, 10 Eng. L. & Eq. 437, and *Read v. G. E. Ry. Co.*, L. R. 3 Q. B. 555, are often cited as sustaining opposite views, but they are, in fact, when correctly understood, in perfect harmony. The one holds that the right of the relatives named in the statute is separate and distinct from that possessed by the decedent; the other, that the right of the relatives is contingent upon the death of the injured person without having his claim for damages satisfied: *Brown v. Chicago & N. W. R. R. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

The damages recoverable under the act of 1852, and those recoverable under the survival statute embodied in section 103 of article 93 of the code are entirely different. In determining the measure of damages, the nature of the statute under which the action is brought is to be closely observed. If the statute is merely a survival statute, the recovery is limited to such damages as might have been recovered by the deceased himself ³⁴³ had he survived the injury and brought the action. If the statute, however, creates a new cause of action distinct from that which the deceased might have maintained, the measure of damages is the pecuniary loss sustained by the parties entitled to the benefit of the action. In the one case, that is, under the survival statute, the damages are limited to

compensation for the pain and suffering endured by the deceased, his loss of time, and his expenses between the time of his injury and his death: 8 Am. & Eng. Ency. of Law, 912. In the other case, that is, under the act of 1852, the injury resulting from the death of a person is to be measured by the standard of the pecuniary value of the life of the person to the party entitled to the damages: 8 Am. & Eng. Ency. of Law, 910; Baltimore etc. R. R. Co. v. State, 60 Md. 449. Or, as epigrammatically stated in *Needham v. Grand Trunk R. Co.*, 38 Vt. 294: "Such damages to the widow and next of kin begin where the damage of the intestate ended, viz., with his death." The title of the act of 1812 conclusively indicates that the damages recoverable under it are not the same as those which the deceased might have recovered. It is "an act to compensate the families of persons killed by the wrongful act, neglect or default of another person."

If the view taken by this court and by the English decisions, to the effect that Lord Campbell's Act created a new cause of action, be correct—and it is too late at this day to doubt its correctness—and if it be true that the survival statute contained in section 103, article 93 of the code of 1904 saves to the personal representatives of the deceased the action which he could have brought in his lifetime, for injuries arising from negligence or default, then it must follow necessarily that neither of those actions is the alternative of, or substitute for, the other, and consequently that both may be maintained. This conclusion, as we have already intimated, dispenses with a review of the cases in other jurisdictions which hold that though two rights of action exist, yet a satisfaction of one is a bar to the other—and it dispenses with a review of them because it is obvious if the two actions accomplish different results³⁴⁴ and stand on different bases, secure different damages, and are for the benefit of wholly different persons, they cannot be alternative or substitutionary, and hence the satisfaction of the one can in no way affect the other. We are not now speaking of the effect of a settlement made by the injured person in his lifetime. The cases which hold that statutes like Lord Campbell's Act apply only to instances of instantaneous death have never been followed here, because there is nothing in our act of 1852 to warrant such an interpretation of it, and the established and unbroken practice under it has been to the contrary. Finally, cases which hold that statutes similar to Lord Campbell's afford an exclusive remedy cannot

be adopted in this state, because in an action like this—a suit by the personal representative—which is founded on a statute entirely different from the act of 1852, the last-named act gives no remedy at all. If it gives to the personal representative no remedy, though other statutes do, it cannot be said that the remedy which it does give to the family of the deceased excludes a recovery of the personal representative.

No difficulties will be encountered, we apprehend, in administering the law as we interpret it, and defendants will be exposed to no danger of injustice. The trial judge can easily, by proper instructions, limit the recovery in a survival action to the loss actually caused to the deceased prior to his death; and in the action under the act of 1852, to the pecuniary loss sustained by the surviving relatives entitled to the benefits of that provision. “A little dispassionate reflection on the subject, it would seem, would prevent unqualified condemnation of the legislative wisdom that says, if a person be wrongfully injured, the pain and suffering and expense to him in consequence thereof shall not be lost to his estate by the circumstance of his death from the injury before receiving satisfaction for his damages, even though the damages to his surviving relatives to satisfy their own grievance may be recovered”: *Brown v. Chicago & N. W. R. R.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

Entertaining this view of the meaning of our several statutes on this subject, we are constrained to hold that the court ³⁴⁵ below committed an error in sustaining the demurrer, and its judgment will be reversed, with costs, and a new trial will be awarded.

Judgment reversed, with costs above and below, and new trial awarded.

Actions for the Wrongful Death of a human being are discussed in the note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 669. The usual aim of statutes creating a cause of action for wrongful death is to allow only one action for an injury resulting in death. This, however, is not always the case: See the note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 682.

HARTMAN v. THOMPSON.

[104 Md. 389, 65 Atl. 117.]

DEED to Person Under Assumed Name.—A conveyance to a person by a fictitious or assumed name passes the title. (p. 426.)

LANDLORD AND TENANT—Assignment of Leasehold.—A holder of a leasehold interest in land may assign it to another for the express purpose of terminating his future liability for rent, provided the conveyance is designed by both parties to divest the estate of the grantor and vest it in the grantee. Such an assignment is not a fraud upon the owner of the reversion. (p. 427.)

CONTRACTS Under Assumed Name.—One not engaged in a fraudulent or criminal purpose may enter into a contract under any name he may choose, and the act is binding upon him, and upon others. (p. 428.)

LANDLORD AND TENANT—Assignment of Leasehold.—The only duty which the assignee of a leasehold estate owes to the reversioner is the payment of the stipulated rent accruing and the taxes becoming demandable, so long only as he continues to be the owner of the leasehold estate, and whenever he divests himself of this estate by a valid assignment to another, even though it be without a valuable consideration, the reversioner cannot complain. (p. 430.)

AGENCY.—Declarations of an Agent made after the transaction to which his agency related is closed are not admissible in evidence. (p. 431.)

AGENCY of Husband for His Wife is no more extensive in scope or longer in duration than that of any other agent similarly constituted. (p. 431.)

DEEDS.—Acknowledgment and Recording of a deed are sufficient to warrant a presumption of a legal delivery and acceptance thereof. (p. 431.)

DEED to Person Under Assumed Name.—A grantee who directs a conveyance to be made to him under an assumed name, and who pays the agreed price, and subsequently accepts and holds the conveyance, practically entering into possession of the property, and expressly claiming title thereto, is bound by such deed. (p. 431.)

The following are the defendant's rejected prayers:

“Defendant's 1st Prayer.—If the jury shall find from the evidence that the defendant executed, acknowledged and recorded a deed of which a certified copy has been offered in evidence, and, that in executing said deed, and recording the same, the defendant intended to convey the property mentioned therein to the person who testified that his name is Louis F. Graffin, and if they shall further find that the said Louis F. Graffin agreed with the husband of the defendant, as agent of the defendant, to purchase said property in the name of James Moore, and that the said executing, acknowl-

edging and recording (if they shall find the same) were for the purpose of carrying out the said agreement, and said Graffin afterward had possession of said deed and claimed said property thereunder, their verdict must be for the defendant; and the jury are further instructed that the paper offered in evidence, and purporting to be a certified copy of a deed from the defendant to James Moore, is evidence that the original deed of which said paper purports to be a copy, was duly executed and acknowledged on the date named in said copy, and that the same was delivered by her, and that the deed was recorded on the date shown by the copy. (*Rejected.*)”

“*Defendant's 2nd Prayer.*—If the jury shall find from the evidence that the defendant executed, acknowledged and recorded a deed of which a certified copy has been offered in evidence, and, that in executing said deed, and recording the same, the defendant intended to convey the property mentioned therein to the person who testified that his name is Louis F. Graffin, and if they shall further find that the said Louis F. Graffin agreed with the husband of the defendant, as agent of the defendant, to purchase said property in the name of Louis Moore, and that the said executing, acknowledging and recording (if they shall find the same) were for the purpose of carrying out the said agreement, and said Graffin afterward had possession of said deed and claimed said property thereunder, their verdict must be for defendant; and the jury are further instructed that the paper offered in evidence and purporting to be a certified copy of a deed from the defendant to James Moore, is evidence that the original deed of which said paper purports to be a copy was duly executed and acknowledged on the date named in said copy, and that the same was delivered by her, and that the deed was recorded on the date shown by the copy. (*Rejected.*)”

S. G. Horwitz and W. E. Schloegel, for the appellant.

W. H. Harris and H. W. Fox, for the appellee.

300 PEARCE, J. This suit was brought for the recovery by the appellee's decedent of certain installments of ground rent then due and unpaid, issuing out of a lot of land in Baltimore City on Penn Lucy avenue, under a renewable ninety-nine year lease, together with certain taxes chargeable against said property, which had been paid by the appellee's decedent

for the protection of his interest in said property. This lease was made June 29, 1892, by Samuel C. Houlton, to Augustus D. ⁴⁰⁰ Clemens, and reserved a yearly rent of ninety dollars, payable in two equal installments July 1st and January 1st in each year, and contained the usual covenants by the lessee, his personal representatives and assigns for the payment of the rent, and all taxes and assessments on the demised premises, when legally demandable. The reversion in this lot had become vested, at the time of this suit, by mesne assignments in the appellee's decedent, and the leasehold, in like manner, sometime before the institution of this suit, had become vested in the appellant. When the suit was brought, there were due and unpaid three installments of rent amounting to one hundred and thirty-five dollars, as also sixty dollars and twenty-two cents taxes paid by the appellee's decedent for the protection of the reversion.

To the declaration of the plaintiff, the defendant pleaded that before any of the rent and taxes sued for had become due and demandable, "she, jointly, with her husband, Jacob G. Hartman, assigned to one James Moore, otherwise known as Louis F. Graffin, by deed, duly executed, acknowledged, delivered and recorded, the said leasehold interest; and the said James Moore is the same person as Louis F. Graffin; and the plaintiff, long prior to the institution of this suit, was informed that said Graffin was the same person as said Moore, and that he had accepted title to said property in the name of said Moore." The appellee filed a replication denying all the allegations of the plea, and on this the issue was joined, the other matters alleged in the declaration being admitted by the pleadings: *Zihlman v. Cumberland Glass Co.*, 74 Md. 303, 22 Atl. 271. The sole question in the case raised by the pleadings is whether the effect of the alleged assignment to Louis F. Graffin under the name of James Moore was to vest the leasehold estate in said Graffin. If it did, the liability of Mrs. Hartman, resting only in privity of estate, was at an end. If it did not, her liability continued, and upon this issue the burden of proof is upon the appellant: 1 *Greenleaf on Evidence*, sec. 74; 1 *Jones on Evidence*, sec. 176; *Frederick T. S. Institute v. Michael*, 81 Md. 487, 32 Atl. 189, 340, 33 L. R. A. 628. It is admitted by written agreement that Mrs. Hartman, who lived in South Dakota at the time of the trial, would, if present, ⁴⁰¹ have testified that she placed this property in the hands of her husband, Jacob G. Hartman, for sale by him

as her agent; that the deed of assignment mentioned in the plea was presented to her for execution, by her husband, and that she executed it, believing that the "James Moore named as grantee therein was the true name of the actual purchaser." The deposition of her husband was offered in evidence, but was properly excluded, because the name of the witness was not inserted in the notice of the names of the witnesses proposed to be examined. Only two witnesses testified in the case—William E. Schloegel, one of the appellant's attorneys, called on her behalf, and Louis F. Graffin, the alleged assignee of the leasehold estate, called on behalf of the appellee. At the close of the case, the plaintiff offered two prayers, the first requiring the jury to find all the facts necessary to warrant a recovery, if no assignment of the term had been set up, and then instructing them to find their verdict for plaintiff, for such rent and taxes as they should find to have been due and payable when suit was brought, unless they should further find that before suit was brought, the defendant had assigned the leasehold interest in said lot "by a good and sufficient conveyance thereof, in good faith divesting herself of all estate and interest in and control over said lot of land." The second prayer instructed the jury that there was no evidence in the cause legally sufficient to show that the defendant had in good faith divested herself of all estate and interest in and control over the said lot of land, and both these prayers were granted. The defendant offered two prayers, both of which were rejected, and which will be set out by the reporter. The defendant specially excepted to the plaintiff's first prayer because she alleged it submitted to the jury a question of law, viz., whether the defendant by a good and sufficient conveyance assigned the leasehold interest in the lot in question. This motion was overruled, to which the defendant excepted—as well as to the granting of the plaintiff's two prayers and the rejection of her own two prayers, and the verdict and judgment being against her, she has appealed. Four ⁴⁰² exceptions were taken to the admission of testimony, which will be mentioned later.

The general principles applicable to the main question in this case are sufficiently established, and are not the subject of serious controversy between counsel. The difficulty lies only in dealing with the testimony. Mr. Washburn, in his work on Real Estate, volume 3, section 2116 (sixth edition), says: "The object of names being to distinguish one person

from another, it seems to be sufficient if this is effected, though the true name of the party be not used, or even no name at all." In 1 Devlin on Deeds, section 191, it is said: "A patent issued to a person under an assumed name is not void, and a conveyance by such person under his assumed name will transfer title. But if issued to a person not in existence, the patent would be a nullity." This qualification is obviously a necessary one, because a grantee is as necessary to the conveyance of land as a grantor. In note "d" to the case of *Davis v. Hollingsworth*, 84 Am. St. Rep. 233, 113 Ga. 210, (38 S. E. 827), the editor, Mr. Freeman, says: "Care must be taken to distinguish between a deed to a fictitious person who has no existence, and one to a person in existence, the conveyance being made to him by a fictitious name. If a person is in existence and ascertained, a conveyance to him by a fictitious name will pass title. In such a case, if the grantee is in existence and can be identified, it is immaterial by what name he may be called and he may even assume a name for the occasion." In *Thomas v. Wyatt*, 31 Mo. 188, 77 Am. Dec. 640, a patent was issued to Samuel Johnson, and in an ejectment suit by one claiming under a conveyance from Samuel Johnson, the proof being that Samuel Johnson was an assumed name of James Coleman, and not a fictitious person, the plaintiff was held to have good title.

In *Blinn v. Chessman*, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666, it was held that one who accepts a conveyance in which his name is not correctly stated is deemed to have adopted that name for the purpose of acquiring and holding title to the property. The court said: "The name is not the person, and where one assumes, or comes to be known by, another name than that which he ⁴⁰³ properly bears, that name may be effectually employed for the purpose of designating him."

The case of *David v. Williamsburg Fire Ins. Co.*, 83 N. Y. 265, 38 Am. Rep. 418, is an instructive discussion by Judge Earl of the principles involved. Henry Davis conveyed the insured premises to Marx David, who was a fictitious person, and afterward Henry David, in the name of Marx David, conveyed them to Henry's wife, Caroline David. In an action by her upon a fire policy on the premises, the trial court charged that if the jury believed that Marx David was a mythical person, or that there was no such real person, and that he never executed the conveyance to the plaintiff, it was an end of

plaintiff's case, and they must find for defendant. On appeal this was held error, the court saying: "In considering this case it must be assumed that the deed was delivered, and that Mrs. David took possession of the property claiming to be the owner, as there was proof tending to show those facts. It must also be assumed, as nothing to the contrary appears, that Henry David executed the conveyance with the intention to vest title in the plaintiff." In *Petition of John Snook*, 2 Hilton, 566, Chief Justice Daly went at length, and with much learning, into the subject, and summed up his conclusion in these words: "All that the law looks to is the identity of the individual, and when this is clearly established, the act will be binding upon him and upon others." This statement of the law is substantially approved in *Bernstein v. Hobelman*, 70 Md. 29, 16 Atl. 374, where the court quotes *New York African Soc. v. Varick*, 13 Johns. 38, to the effect that where a deed is made to a corporation by a name other than the true name, the plaintiffs may sue in their true name and aver in the declaration that the defendant made the deed to them by the name mentioned in the deed. As there is no privity of contract between the assignee of the reversion under such a lease as the present, and the assignee of the term, there is no reason why the liability of the latter should not be as effectually destroyed by a deed made in good faith to one under an assumed name as if made to the grantee by his true name. It is not a fraud ⁴⁰⁴ upon the owner of the reversion, if the owner of the term assign it to another for the express purpose of terminating his future liability for rent, provided the conveyance is designed by both parties to divest the estate of the grantor and vest it in the grantee. There is no principle of law or morals which can require the termor to retain the term for the protection of the owner of the reversion, if he thinks it to his advantage to dispose of it, and it is not material if his grantee has no financial responsibility. In *Scanlan v. Grimmer*, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146, it was held that one not engaged in a fraudulent or criminal purpose may enter into a contract under any name he may choose to assume, and that when his identity is established, the act will be binding upon him and upon others. In that case, Davis, who was the real mortgagee in a bona fide mortgage, for the purpose of that transaction, assumed the name of Alexander as mortgagee, and the mortgage was subsequently assigned in good faith and for value to Grimmer.

The mortgagors sought to set aside and cancel this mortgage, because they were misled and intended to mortgage the land to Alexander and not to Davis, and the court below so ordered. On appeal this was reversed, the court saying: "The court below failed to apply the true and well-settled rule to the facts. It overlooked the distinction between the assumed name of a person actually identified, and a wholly fictitious name without an identified person behind it. In assuming the name of a business transaction, Davis was not engaged in a fraudulent or criminal purpose, and he could bind himself as well as other persons by its adoption and use."

Now, what does the testimony show to be the true transaction between Mrs. Hartman and Graffin? We have seen that it is admitted she would have testified if present that she authorized her husband, as her agent, to sell the leasehold estate, and that when she executed the deed in question she believed that James Moore was the true name of the actual purchaser.

William E. Schloegel testified that he was an attorney at law; that he knew Louis F. Graffin; that he drew the deed in question under instruction from Mr. Hartman, who paid the cost ⁴⁰⁵ of drawing and recording; that he, the witness, placed it on record, and that both Hartman and Graffin acknowledged in his presence that the consideration money named in the deed was paid, and that Graffin acknowledged to him that he bought the property in the name of James Moore, and that the witness knew Graffin, after the recording, had the deed in his possession, and accepted it as such, and that two or three months thereafter Graffin came to him to know if he had no right to the property under that name; that some parties were attacking the title, and he wished to know if he would not have an action of damages against them. The witness further testified that he drew the deed to James Moore by Hartman's direction, and that he did not know whether there was any such person as James Moore in existence, except from what Graffin, said, and that Hartman told him he had sold the property to Graffin, and Graffin directed Hartman to make the deed to James Moore. He also testified that, after filing the deed for record, he sent the ticket for the deed to Graffin by Hartman's direction, and that Graffin told him he gave one hundred dollars for the property, and gave his note for that amount, and that the witness knew Graffin took possession and put up a sign on the property,

“For sale, Apply to Mr. Grafflin,” and that he understood Grafflin was a real estate man.

Louis F. Grafflin testified in chief that he had been for twenty years in the real estate business in Baltimore; that he had never been known by the name of James Moore, and knew no one of that name, and that he never directed any property to be conveyed to him by the name of “James” Moore. He admitted the deed in question, after recording, was in his possession, but that it would never have been recorded if he had seen it beforehand; that he and Hartman both went to see a party who would like to buy it, but they could not find James Moore, and could not make any title to it.

On cross-examination he said he thought he told Hartman to make the deed to Louis Moore, and finally admitted specifically that he directed Hartman to have the deed made to some Moore, and after examination covering six pages of 408 the printed record, he said, “Yes, sir. I agreed to purchase it in the name of Mr. Moore,” and that after the deed was recorded and sent to his house he accepted it. He also admitted that he signed a written statement, offered and admitted in evidence, in which he said, “I agreed to give one hundred dollars for the Penn Lucy Lot, and had the deed made to Moore. . . . Being ill at that time, and fearing that Al Horner would give me trouble with all my property, which he has done, I ordered the deed made as above.” He also admitted that he wrote and signed a letter offered and admitted in evidence addressed to Mr. Schoegel, February 16, 1901, in which he asked, “Haven’t I some redress in the Penn Lucy Lot transaction? I buy a lot, and when I try to sell it, I find the man who collects the ground rent has informed my would-be purchaser the title is not valid. Let me know what rights I have.”

On direct examination he was asked if Hartman ever offered to produce James Moore, to which the defendant objected, and his objection was overruled, to which the first exception was taken, and the witness answered that Hartman hunted up several James Moores, but that he did not know them and would have nothing to do with them. The second exception was to the question whether Hartman gave him a list of James Moores, and for what purpose, to which he answered that he did, in order to perfect the title. The third exception was to the question, “What did Hartman propose that any of these James Moores should do to perfect the title?” To

which he replied, "We could give some one a small amount to take the place of James Moore and sign the deed." The fourth exception was to a question as to what he had stated about an effort made by Hartman and himself to sell the property to a lady, and what was the difficulty in effecting a sale to her, to which he replied, "What was stated in one of those letters, that the title was imperfect?"

It must be borne in mind that the only duty which the assignee of a leasehold estate owes the reversioner is the payment of the stipulated rent accruing due, and the taxes becoming demandable, so long, and so long only, as he continues ⁴⁰⁷ to be the holder of the leasehold estate. Whenever he divests himself of this estate by a valid assignment to another, even though it be without a valuable consideration, the reversioner cannot complain. The creditors of the assignee might, in a proper proceeding, attack an assignment made without proper consideration, but the reversioner could not do so. What might be held a fraud upon them could not be so held as against him. Mr. Poe says in section 388 of his work on Pleading, that a real assignment, under which the party retains in himself no beneficial interest, "even when made to a pauper and for the express purpose of escaping further liability, will not be thereby rendered fraudulent if the act be really designed to operate as it appears" It is therefore vain to appeal to this court in the language of the appellee not to "lend its sanction to so unworthy a transaction as was sought to be effected by the attempted assignment of the term in this case." The only question for our consideration is whether the case was properly submitted to the jury to determine whether the assignment was a real and bona fide assignment, and if was such, neither the court nor the jury were concerned with the motives which influenced the one in conveying and the other in receiving the transfer of the title.

The four exceptions to the testimony may be considered together. Each of these exceptions were taken to questions propounded to Graffin for the purpose of introducing the acts and declarations of Hartman, as agent of his wife, in reference to the sale, long after the transaction was closed and his agency was terminated. But the evidence is clear that his agency was only to sell the property, and that the deed had been executed by Mrs. Hartman, the consideration paid by Graffin passing to her his promissory note therefor for one hundred dollars, and the deed recorded and accepted by him,

long before the acts and declarations of Hartman sought to be introduced. It was only during the course of the negotiations which culminated in this sale and conveyance that Hartman could be regarded as the agent of his wife. "The declarations of an agent are admissible only because treated as the declarations ⁴⁰⁸ of the principal, and the latter is bound by them only while the former is acting within the scope of the duties for which he was employed. When these duties are ended, his representative character of necessity ceases": *Phelps v. Georges Creek R. R. Co.*, 60 Md. 536. "Declarations or admissions of an agent by his own authority, and not accompanying the making of a contract, or the doing of an act in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding on his principal, and are not admissible in evidence": *Franklin Bank v. Pennsylvania etc. Steam Nav. Co.*, 11 Gill & J. 28, 33 Am. Dec. 687. There is no authority or reason for treating the agency of a husband for his wife as more extensive in scope, or longer in duration, than that of any other agent similarly constituted. The ruling upon each of these exceptions was therefore erroneous.

We discover no defect of proof as to delivery of this conveyance. "No precise form of delivery need be resorted to. It may be actual or verbal. Acknowledgment and recording are sufficient to warrant presumption of a legal delivery by the grantor": *Stewart v. Redditt*, 3 Md. 67.

The possession of the clerk, after recording, will be regarded as the possession of the grantee. "A certified copy of an instrument required by law to be recorded proves itself as prima facie evidence of all circumstances necessary to give it validity": *Warner v. Hardy's Lessee*, 6 Md. 525; *Hutchins v. Dixon*, 11 Md. 29.

There is nothing in this case to defeat or rebut this prima facie evidence. On the contrary, the evidence is that Grafflin accepted the conveyance. He paid the agreed price by his own promissory note. He accepted the recording ticket, and subsequently accepted and held the deed. He authorized a lady who was negotiating for the purchase of the lot from him to use the stable on the premises, thereby practically entering into possession of the property, and he expressly claimed title thereto in the two letters which have been referred to. All the requirements of the law as to delivery and acceptance are thus gratified.

⁴⁰⁹ The appellant contends that the plaintiff's first prayer, which was granted, was defective in submitting to the jury a question of law, viz., whether the alleged deed of assignment of the leasehold estate was "a good and sufficient conveyance thereof." If any question had been raised in this case as to the legal effect of the deed in respect to its execution, acknowledgment, or the description of the property it purported to convey, this would have been a fatal defect. But the plain purpose of that clause in the prayer was to permit the jury to find their verdict for the defendant, notwithstanding they found in favor of plaintiff upon all the other facts recited in the prayer, if they found that she had, in good faith, by the very deed of assignment offered in evidence, divested herself of all interest in the land. That this was the purpose we think sufficiently appears in the language of the plaintiff's second prayer, which instructs the jury there was no evidence legally sufficient to show that the defendant had divested herself of all estate and interest in, and control over, the lot of land. We do not think, in view of this language, that the jury could have been misled by the language objected to in the first prayer, and if there was no other erroneous ruling in the case, we should hesitate to hold that reversible error. Those words might well be regarded, in the light of the second prayer, as meaning, and understood by the jury to mean, "by a bona fide conveyance," and so understood, they could not have injured the defendant. Upon a new trial, however, the possibility of being misunderstood should be avoided by more careful language.

There was error in granting the second prayer which withdrew the case from the jury. There was evidence that Mrs. Hartman intended to sell and convey her estate and interest in this land, and that when she executed the deed of assignment she did so in good faith, for that purpose, and that she believed James Moore was the true name of the purchaser. There was evidence that Grafflin negotiated for the purchase of this property for himself; that he directed the deed to be made in the name either of James Moore or Louis Moore; ⁴¹⁰ that he paid the agreed price of one hundred dollars by his own promissory note; that he accepted the recording ticket for the deed, and subsequently accepted the deed itself, and claimed title to the property. This evidence certainly tended to sustain the defendant's contention that she had in good faith divested herself of all estate and interest in the land, if we

have correctly stated the law in this case, as to the adoption by Graffin of the name of James Moore, and as to the legal presumption of delivery arising upon the facts of the case; and if this evidence is believed by the jury, it would have supported a verdict in the defendant's favor.

The defendant's first and second prayers we think correctly state the law of the case. The first prayer is drawn to meet the theory that Graffin gave the name of James Moore as that to be inserted in the deed. The defendant's husband was her agent to sell this property and have the deed prepared. He knew that Graffin was the real purchaser, and it must be presumed that she intended to convey to the real purchaser by whatever name he gave.

The second prayer is drawn to meet the theory Graffin attempted to set up—that he gave the name of Louis Moore. This is entirely immaterial, however, to the defendant's contention, since if Graffin accepted the conveyance drawn in the name of James Moore, he is bound by such acceptance, though he had directed it to be made to Louis Moore. The only effect the giving of the name of Louis Moore instead of James Moore can have is to strengthen the proof that he was the actual purchaser, and as such preferred to use his own first name, discarding the surname only to avoid his creditors.

For the errors indicated, the judgment must be reversed.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

A Contract Entered into Under an Assumed Name is binding. One not engaged in fraudulent or criminal purpose may enter into a contract under any name he may choose to assume. All that the law looks to is the identity of the individual. When that is established, the act will be binding on him and upon others: *Scanlan v. Grimmer*, 71 Minn. 351, 70 Am. St. Rep. 526; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 24 Am. St. Rep. 351. Therefore, if the true owner conveys property by any name, the conveyance transfers title: *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347. And if the owner of real estate executes a deed to a fictitious grantee, and then under the name of such grantee executes another deed thereof to another, the latter obtains a good title: *David v. Williamsburgh City Fire Ins. Co.*, 83 N. Y. 265, 38 Am. Rep. 418. As to whether the record of chattel mortgage under an assumed name imparts notice, see *Mackey v. Cole*, 79 Wis. 426, 24 Am. St. Rep. 728; *Alexander v. Graves*, 25 Neb. 453, 13 Am. St. Rep. 501.

The Implied Authority of a Wife to act for her husband and bind him by her contracts is discussed in the note to *Wanamaker v. Weaver*, 98 Am. St. Rep. 627.

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The Recording of a Deed is prima facie evidence of its delivery: See the note to *Brown v. Westerfield*, 53 Am. St. Rep. 547; *Creighton v. Roe*, 218 Ill. 619, 109 Am. St. Rep. 310, and cases cited in the cross-reference note thereto.

STUMP v. WARFIELD.

[104 Md. 530, 65 Atl. 346.]

TRUSTS—Power to Sell and Reinvest—Right to Mortgage.—If a trustee is authorized to sell and dispose of the trust property and reinvest the proceeds, he can execute a valid mortgage for the purchase money of property purchased, or any part thereof. (p. 437.)

TRUSTS—Power to Sell—Right to Mortgage.—Power in a trustee to grant and convey absolutely does not authorize him to mortgage the trust property. (p. 438.)

TRUSTS—Power of Sale—Limitation.—If a feme covert is given only an equitable life estate with power of disposition of the property absolutely for a purpose clearly defined, the limitation operates as a negation of any other purpose. (p. 439.)

TRUSTS—Power of Sale—Right to Mortgage.—A trustee or life tenant with power of sale absolutely is not authorized to mortgage the trust property to secure money loaned for the purpose of paying taxes, interest due on a purchase money mortgage and other expenses connected with the trust property, and such mortgage affects only the interest of the life tenant and not that of the remaindermen. (p. 441.)

TRUSTS—Power to Sell—Right to Mortgage.—If a donee of a power to sell land also has an interest in his own right, a conveyance or mortgage of the land by him, not appearing expressly or impliedly to be made in the execution of the power, passes his interest only. (p. 441.)

MORTGAGES—Assignment—Power of Sale.—If the assignee of a first mortgage is also the mortgagee in a second mortgage to secure the payment of the first and also additional money loaned by him, a sale by the attorney named in the second mortgage as agent to sell in case of default is not a foreclosure of the first mortgage, and passes only the interests bound by the second mortgage. (p. 442.)

TRUSTS—Power to Sell—Right to Mortgage—Rights of Remaindermen.—If a trustee or life tenant, with power of absolute sale, executes a mortgage on the trust property which is not a valid execution of the power, and conveys only the interest of the life tenant, without binding the interest of the remaindermen, they are entitled to recover the property by action in ejectment against the purchaser under the mortgage foreclosure, and in possession after the death of the life tenant. (p. 445.)

POWERS—Mortgages Under—Subrogation.—If there is a first mortgage, which is a valid execution of a power, and a second mortgage which is not a valid execution of such power, and conveys only the life interest of the donee in the power, and the purchaser, under

foreclosure of the second mortgage, pays off the first mortgage, he may be subrogated to the rights of the first mortgagee, unless it is clearly established that the second mortgage was intended to convey the life estate alone, or that his right to subrogation is in some other way barred. (p. 447.)

EQUITABLE BELIEF After Judgment at Law.—A defendant in ejectment is not always precluded from seeking relief in equity after judgment against him, on the ground that he has not filed a plea by way of equitable defense, as there are some cases in which the equitable rights of a defendant in ejectment can be determined only in a court of equity. (p. 447.)

W. Grason, E. W. Herrman and H. A. Stump, for the appellants.

R. H. Gordon and E. J. Cook, for the appellees.

538 BOYD, J. This is an appeal from a judgment rendered in favor of Charles A. Warfield and others (appellees) against Messrs. Stump and Herrman, trustees (appellants), in an action of ejectment brought to recover a tract of land in Baltimore county. On February 6, 1869, Timothy A. Carroll, in consideration of the sum of \$8,000, conveyed the property in controversy to Charles D. Warfield, in trust for the benefit of his **539** wife, Isabella, during her life or widowhood, she to collect the rents, issues, income and profits therefrom, for her sole and separate use free from the power, disposal or control of her husband, and after her death or marriage in trust for their children, etc. Then, after making provision that, in case Mr. Warfield survived his wife, upon her death the property should be for their children, etc., the deed proceeds as follows: "With power, however, to the said Isabella Warfield, with the consent and approbation of the said trustee, to grant and convey absolutely said property at any time, and the proceeds to reinvest in other property upon similar trusts as are herein declared, no purchaser, however, to be bound to see to the application of the purchase money."

On the same day, "Isabella Warfield and Charles D. Warfield, her husband and trustee," gave a mortgage to Mr. Carroll to secure three promissory notes, amounting in the aggregate to \$3,119. It recites that they were given in part payment of the purchase money for said property, and that the trustee united to show his consent and approbation of the conveyance.

On July 21, 1870, Isabella Warfield and Charles D. Warfield, trustee, gave a mortgage to Clara A. Ross, which recites that she was the assignee of the mortgage and the three notes

given to Carroll, which then amounted to \$3,391.91, and that she had loaned Isabella Warfield \$900, "which last sum the said Isabella hath used in extinguishing claims against her incurred on account of the interest aforesaid and other debts contracted for the benefit of the property hereby mortgaged, making in all an indebtedness of four thousand dollars." It also states that Charles D. Warfield had given his note for the \$900, and four notes of \$120 each, being the interest on the said sum of \$4,000, payable in six, twelve, eighteen and twenty-four months, respectively. The notes were all signed by him individually. An assignment of the first mortgage and of the three notes described therein to Clara A. Ross was executed by Carroll and duly recorded. There was a power of ⁵⁴⁰ sale in the first mortgage to Timothy A. Carroll, or Samuel D. Schmucker, his attorney, and one in the second to Clara A. Ross, or Luther M. Reynolds, her attorney or agent. The second provides for the payment of the notes mentioned in the first, as well as the others mentioned above.

A petition was filed in the circuit court for Baltimore county by Clara A. Ross, showing that she was the holder of the two mortgages, alleging that they were in default, that she was desirous of selling the property, and asked the court "to accept and approve the bond of the attorney in the later mortgage named, that he may proceed to sell." Mr. Reynolds gave bond, advertised the property, and on July 15, 1871, sold it to Elias Livezy for \$4,450. Exceptions were filed to the sale, but were overruled; a petition was filed to open up the decree, which was dismissed, and the case, which will be hereafter referred to, was brought to this court. Finally, on August 18, 1873, a writ of possession was ordered, requiring Mr. and Mrs. Warfield to deliver possession of the property to Elias Livezy, the purchaser, which they did. On January 19, 1874, Luther M. Reynolds, attorney, and Elias Livezy and wife conveyed the property to Eliza J. Miller, she having purchased the interest of Mr. Livezy. On March 28, 1878, Mrs. Miller and her husband conveyed the property to William H. Reid, and the appellants represent his interest, through some proceedings in the circuit court No. 2, of Baltimore City.

The defendant filed the general issue plea and a plea on equitable grounds. The latter was demurred to and the demurrer was sustained. The case was tried before the court, and at the trial an agreed statement of facts and certain rec-

ord evidence were offered. The court found in favor of the plaintiffs (now appellees), and its rulings on the demurrer to the equitable plea and on the prayers present the questions before us. Before passing on the plea and prayers separately it will be well to consider the principal points involved.

1. It is conceded by the appellees that the first mortgage—the one to Mr. Carroll—was validly executed, but it is contended ⁵⁴¹ that the second only passed Mrs. Warfield's life interest, because the mortgagors had no power to mortgage any other interest. It undoubtedly the general rule that "a power to sell and convey does not confer the power to mortgage." It was so held in *Tyson v. Latrobe*, 42 Md. 325, and the court added: "Questions of this sort must depend upon the peculiar circumstances of the trust, and the intention of the parties as shown by the instrument. A trust with a power of sale 'out-and-out' will not authorize a mortgage; and a trust for sale with nothing to negative the settler's intention to convert the estate, absolutely, will not authorize the trustee to execute a mortgage." The latter part of the quotation adopted the language of 2 Perry on Trusts, section 768. See, also, *Wilson v. Maryland Ins. Co.*, 60 Md. 150; *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453; *Bloomer v. Waldron*, 3 Hill, 361; *Hoyt v. Jaques*, 129 Mass. 286; 1 Jones on Mortgages, sec. 129.

Although the appellees concede that the first mortgage was valid, it will be well to examine some of the authorities which announce an apparent exception to the general rule, and determine that when a trustee is authorized to sell and dispose of trust property and reinvest the proceeds, he can give a mortgage for the purchase money, or any part thereof, in order that we may see the reasons for such exception. In *Gernert v. Albert*, 160 Pa. 95, 28 Atl. 576, the testatrix gave the trustee "authority to sell and dispose of the said real estate at such price or prices as he may deem best to the advantage of my said children, and to reinvest said proceeds in other real estate." The trustee sold the trust property for \$4,750 and purchased another tract for \$3,210, subject to a widow's dower of \$890. He paid \$2,210 cash, and gave a mortgage for the balance of the purchase money. The deed was dated April 2d and the mortgage April 10, 1884, but both were recorded on the latter day and were treated by the court as one transaction. The court held that the mortgage for the purchase money was valid. In passing on that

question it said: "In such a purchase the trustee really buys no more than he pays for; in form he receives the whole legal title, but his actual ⁵⁴² interest in the land is only what remains after he pays to the vendor from time to time the annual value of the mortgage. In substance, the vendor continues to be a part owner of the land; he did own the whole of it, and while he transferred the legal title with one hand, he took back a real definite interest with the other, so that it may truthfully be said that at no point of time was his grasp so far relaxed as to enable the trust to seize what it did not buy and never was intended to have." The court distinguished between that case and *Wilhelm v. Folmer*, 6 Pa. 296, where it was held that a judgment given for purchase money a week after the deed was made, but not recorded for another week, was invalid against the trust estate.

In *Mavrich v. Grier*, 3 Nev. 52, 93 Am. Dec. 373, Mrs. Smith, a feme covert, entered into a contract with Mavrich for the purchase of a house and lot. The transaction was consummated by a conveyance to Grier, to be held in trust for Mrs. Smith. As a part of the transaction, Mrs. Smith gave her note for \$2,000, the price of the house and lot. Grier, as trustee for Mrs. Smith, gave a mortgage for the \$2,000—stating that it was for the purchase money of said property, and he and Mrs. Smith signed the mortgage. It was held that the mortgage was valid to secure the purchase money, "the conveyance and mortgage being executed at the same time and being part of the same transaction."

In *Coustant v. Servoss*, 3 Barb. 128, the court said that when upon the sale and purchase of land a deed is executed and a mortgage given for the purchase money, or part thereof, the presumption is that the deed and mortgage were executed at the same time, and the whole is considered one transaction, and taking the whole together the vendee only acquires the equity of redemption. "In such case the purchaser cannot avoid one part of the transaction and affirm the other. He cannot, nor can anyone for him, take the land and repudiate the mortgage. He either holds the land subject to the mortgage or he does not hold it at all."

In *Hannah v. Carnahan*, 65 Mich. 601, 32 N. W. 835, the wife conveyed ⁵⁴³ real estate to her husband in trust for their minor children. The husband was authorized to sell and convey the property in his discretion and to reinvest the moneys for the benefit of the children, and in case he sur-

vived his wife, to control and govern the property as if he held it in fee simple. He sold the property for \$1,700 and with part of the proceeds purchased land from Hannah, for which he paid him \$800 in cash, and gave a mortgage for \$800. Afterward Carnahan gave another mortgage on the property to Hannah for \$600. The court held that the purchase money mortgage was valid, but "had the purchase price of the premises been in excess of the proceeds of sale of the trust property, the investment would have plainly exceeded the powers of the trustee, if such purchase had to be partly paid by a mortgage upon the land bought."

Without citing other authorities on that question, it can be seen from the above why the courts hold that a mortgage given by a trustee for part of the purchase money of trust property, purchased by him, is valid, unless there be something in the instrument creating the trust prohibiting it. This case is even stronger than most of those cited, because the instrument creating the trust and the mortgage given in part payment of the purchase money were not only executed on the same day and constituted one transaction, but there was in reality nothing for the trust to attach to until the deed and mortgage were executed and delivered, and effect cannot be given to the one to the exclusion of the other.

2. When we come to consider the second mortgage, as we now do, the authorities and reason as clearly show that it was not a valid execution of the power contained in the deed, as those cited above show that the first mortgage was valid. The power given Mrs. Warfield in this deed was limited to her granting and conveying the property, for the purpose of reinvesting the proceeds in another property, upon similar trusts. The power to grant and convey absolutely did not authorize her to mortgage the property, or, to state it in another way by repeating from *Tyson v. Latrobe*, 42 Md. 325, "a trust for sale with nothing to negative the settler's intention to convert the estate, ⁵⁴⁴ absolutely, will not authorize the trustee to execute a mortgage." The property was vested in the trustee for the benefit of Mrs. Warfield and the children, subject to the purchase money mortgage, and her power of disposition was only such as the deed gave her—to grant and convey for the purpose of reinvesting the proceeds of sale, for that is what it meant.

It was settled in this state as early as *Cooke v. Husbands*, 11 Md. 492, "that a feme covert may act in reference to her

separate estate as a feme sole, where the settlement contains no limitations on the subject, on the principle that the *jus disponendi* accompanies the property, unless restrained in terms, or by the manifest intention of the instrument," but it was long prior to that also determined "that where a mode of alienation or of appointment is provided, it operates as a negation of any other mode, and is a paramount law governing and controlling every contract in relation to it": *Cooke v. Husbands*, 11 Md. 503. And where, as in this case, the feme covert was only given an equitable life estate, with power of disposition of the property absolutely, for a purpose clearly defined, the limitation certainly operates as a negation of any other purpose as clearly as it would the mere mode of alienation. If there be any difference, it must be in favor of the interest to be alienated, as in that case she affects the rights of others given by the instrument.

In *Hannah v. Carnahan*, 65 Mich. 601, 32 N. W. 835, the court said, in speaking of Hannah, the vendor: "But when the first mortgage was not paid, he could not take the second mortgage of \$600 upon the premises, in the face of the notice he had of the terms and extent of the trust under which Carnahan held the property. Nor could any person, having notice of the trust, take such a mortgage and enforce it against the property, as there was no power given Carnahan to execute such a mortgage." In *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453, the power was much more comprehensive than that given by this deed, but the court held, after referring to many authorities, that no power was bestowed on the trustee to mortgage or otherwise encumber the property. In that case the lower court held the deed of trust given to ⁵⁴⁵ secure a loan was null and void, because executed without authority, but as \$459.29 of the sum loaned was paid for taxes, it decreed that there should be a lien on the trust property for that amount, with interest and costs. The supreme court of Missouri reversed that part of the decree, and said that the money was not loaned for that purpose, or any special purpose, and added: "But even had it been loaned for that specific purpose and applied in accordance therewith, such loaning and such application would have created no equity of subrogation or otherwise in favor of him who loaned the money to remove the lien." In *Gernert v. Albert*, 160 Pa. 95, 28 Atl. 576, the supreme court of Pennsylvania said: "It is no doubt true that if a trustee has already received a legal title to land

belonging to the trust, he may not afterward encumber it, unless empowered by a court, or expressly or impliedly authorized by the instrument creating the trust." In *Burroughs v. Gaither*, 66 Md. 171, 7 Atl. 243, the court said: "It is doubtless true, as a general proposition, that where the powers and duties of a trustee are limited and defined by the terms of the instrument creating the trust, neither he nor the court under whose administration the trust is carried on can exercise any others," but inasmuch as it was the duty of the trustee to pay taxes, an order of the lower court was affirmed authorizing the receivers whom the court had appointed to give a mortgage to raise money in order to redeem the trust property which had been sold for taxes. In this case it was the duty of Mrs. Warfield, the life tenant, to pay the taxes, the interest on the mortgage which was on the trust property when she acquired it, and other expenses connected with the property, and it is clear that she could not afterward encumber the fee for such purposes. When a donee of a power to sell land also has an interest in his own right, a conveyance of the land by him, not appearing expressly or impliedly to be made in the execution of the power, will be held to pass his interest only (*Ridgely v. Cross*, 83 Md. 161, 34 Atl. 169), and he certainly is presumed to have only intended to include his own interest when he gives a mortgage for his own debts.

546 Nor do we think that they had the power to give a second mortgage for the purchase money. The mere fact that there was no such power given by the deed, and that the second mortgage was not embraced in the exception in favor of purchase money mortgages, ought to be a sufficient reason for so declaring, in view of the authorities quoted, but if it could be allowed, it is easy to see what the result would have been if the life tenant did not pay the interest on the first mortgage. This second mortgage shows on its face that \$272.91 of interest due on the first was included in it as principal, and interest notes were given which included interest on the interest, as well as on the principal, and on the additional amount borrowed. If that be permitted, it could be repeated from time to time, and it would not take many years to double the amount of the original mortgage to the great detriment of the remaindermen. There could have been no possible reason for giving another mortgage to secure the first, excepting to thereby raise the interest and other amounts wanted by the life tenant. This trust was created subject to

the mortgage of \$3,119.00, but there was no power in Mrs. Warfield to execute another mortgage on the trust estate, as the deed did not authorize that, even with the consent of the trustee. The second mortgage was therefore, in our opinion, of no effect against the interests of the remaindermen, and was only binding on the life estate of Mrs. Warfield.

It is true that in the case of *Warfield v. Ross*, 38 Md. 85 (which was an appeal from the refusal of the lower court to open the decree of ratification of sale and in which this court also considered the final order of ratification), it was said that the powers conferred by the last mortgage "were amply sufficient to authorize the attorney to sell." It was, however, also said that "the mortgagors, Charles D. and Isabella Warfield, were estopped by their deed from denying they had power to mortgage. Their interest, whatever it was at the time of recording the mortgage, passed by the sale when ratified, to the purchaser. All others, not parties to the mortgage, were strangers and wholly uninjured by the sale. In our view⁵⁴⁷ of the case, it was wholly immaterial to inquire at the instance of the exceptants what title Timothy A. Carroll conveyed to them, and unnecessary and improper to make Mr. Carroll, or the reversioners in the deed from Carroll to the Warfields, parties to the proceedings under the mortgage. The exceptants had no ground of complaint on that score. The purchaser alone was injured by the defect of title, if any." It is unfortunate that the court did not then determine what title was conveyed to the "exceptants"—which term included the remaindermen, as the five children were joined in the exceptions, but it is clear that nothing was decided that can in any way affect the claim of the appellees, unless it be the mere statement that the attorney had power to sell. Inasmuch, however, as the court declined to determine what interest was conveyed by the mortgage, and consequently what was sold by the attorney, as of course he could not sell more than was conveyed by the mortgage, that question was left open. We have no doubt what it was—it was and could be nothing more than the interest Mrs. Warfield had, and that was an equitable life estate. As she had no power to mortgage the interests of the remaindermen, the trustee could not by joining in the deed give her such power. Indeed, the deed does not attempt to give the trustee any power, but he was simply to give his consent and approbation to his wife's grant and conveyance. The deed from L. M. Reynolds, attorney,

and others, to Mrs. Miller, which is dated January 19, 1874, shows that Elias Livezy had not paid any of the purchase money at that time, but Mrs. Miller then paid it. The case of Warfield v. Ross, 38 Md. 85, was decided May 22, 1873, about eight months before the purchase money was paid, and there was thus ample notice to the purchaser that the court had declined to determine the question as to what interest had passed by the sale, and that the court had said the interest of the remaindermen was unaffected by the sale.

Nor can there be any possible doubt that Mr. Reynolds could not sell under the first mortgage, for the simple reason that he was not named in it, but another attorney was, and it ⁵⁴⁸ is not claimed that it had been assigned to him. He was named in the second as the attorney or agent to sell, in case of default, and the presumption would be that he did sell under that mortgage, and the proceedings show that he did. As we have seen, the petition of Clara A. Ross, signed by him, asked the court to approve "the bond of the attorney in the later mortgage named, that he may proceed to sell." His bond recites that mortgage alone—says that in pursuance of the power contained in that mortgage, which is accurately described, he "is about to proceed to sell the real estate in said mortgage mentioned." His advertisement likewise states that he would in pursuance of the power contained in the mortgage to Clara A. Ross (giving the date and place of record) sell the property, and his report of sale described the mortgage with the same particularity—neither the bond, advertisement nor the report of sale mentioning the first mortgage. The petition of Clara A. Ross evidently proceeded on the theory that as she held both mortgages, the sale could be made free and clear of both, and that she was willing to accept payment of both as the second included the indebtedness of the first. That was evidently the view adopted by the court in 38 Md. 91, for it is there said: "An express authority having been conferred by the last mortgage to sell in case of default of payment of any of the sums secured by the first, it is unnecessary to inquire whether the power of sale conferred on the first mortgagee passed by assignment of the mortgage, or the notes thereby secured, to the second mortgagee or her attorney." Manifestly it did not, and could not, to the attorney, Mr. Reynolds, and if it did to Mrs. Ross, as the assignee of the mortgage, she did not make the sale under the power in that

mortgage, but Mr. Reynolds made it under the second mortgage.

The appellants rely on the case of *Madigan v. Building Assn.*, 73 Md. 317, 20 Atl. 1069, and *Queen City Building Assn. v. Price*, 53 Md. 397, but we cannot see how they reflect upon the question. In *Madigan's* case the court had under consideration the act of 1890, chapter 187, which made valid and ⁵⁴⁹ effectual sales made by persons who had not been named in powers of sales in mortgages. This court sustained the validity of the statute, but it was passed to cure the defect in sales made under defective powers of sale in mortgages, and not defects in the mortgages themselves. The court said: "The mortgage in this case was in all respects perfectly valid and formally executed; and the estate in the mortgaged premises was thereby transmitted to and vested in the mortgagee; and the only defect consisted in the delegation of the power of sale, as a summary remedy for default, under the statute." In this case it is not a defect in the power of sale—that was settled in the 38th Md.—but the question is the one which was left open in 38th Md., namely, What interest was conveyed by the second mortgage and sold by the attorney named therein? If a mortgage only included a life estate, it is not necessary to cite authorities to show that the legislature could not pass a retroactive statute to make it cover the fee, and nothing of that kind was attempted by the act of 1890.

So in *Price's* case, which was an attempt to have *Lowdermilk's* case in 50 Md. 175, modified or explained, this court held that the purchaser at a sale made under a void power would, in a court of equity, be equitably entitled, as the assignee of the mortgage to the extent he had paid the purchase money, but the question again arises, What interest did this mortgage convey? If it had been valid to pass the fee, including the remainders given the appellees by the *Carroll* deed, and the power of sale had been defectively executed, *Price's* and *Madigan's* cases would apply, but as the second mortgage was invalid, in so far as the remainders are concerned, an assignment of it could be of no avail.

3. This brings us to the consideration of the demurrer to the plea on equitable grounds. It shows on its face that Mr. Reynolds did not have power to sell, under the second mortgage, the interests of the remaindermen, in view of the law which we have announced above, and it does not show that he had power to sell under the first mortgage. In speaking of

the latter it says, "with power in said mortgage contained to ⁵⁵⁰ said Carroll or his attorney to sell," but does not allege that Mr. Reynolds was the attorney named, which in point of fact he was not, as the mortgage shows. If the theory of the plea was that the defendants were entitled to be subrogated to the rights of the mortgagee in the purchase money mortgage, it certainly is not sufficient. It alleges that the mortgage was paid, and surely if the defendants can now be subrogated to the purchase money mortgage, they could not ask a court of equity to do that, and then declare the plaintiffs barred by reason of the possession of the defendants and those under whom they claim. Under no principle of equity could they be subrogated for such purposes or on such terms, but if entitled to be subrogated at all, it would only be to the extent of that mortgage, and in order to have made this plea a valid one on that theory, it should at least have alleged that they had made demand on the plaintiffs for the amount of that mortgage, which had been refused, or show their willingness to have surrendered the property upon payment thereof. There is nothing to suggest their willingness to do so, but, on the contrary, they not only filed their plea of not guilty, but set up this plea as a bar to the plaintiffs' recovery, because, as they alleged, they were entitled to be in "the shoes of Clara A. Ross, as assignee of Timothy A. Carroll, mortgagee." In other words, they claim, in a plea which is supposed to be governed by equitable principles, that because, in equity, the plaintiffs ought to pay them \$3,119, they are not entitled to the property, even if it is worth more, although they never offered to surrender the property on payment of the sum they allege the plaintiffs should in equity be required to pay.

If that was not the theory of the plea, it was defective on other grounds. Inasmuch as the sale was under the second mortgage, and the mortgagors had no power to convey anything more than the life estate of Mrs. Warfield, the purchaser did not acquire by the sale more than that life estate. He and his successors were therefore presumed to have been in possession under the life estate. They certainly could not claim to be in possession under a mortgage which they allege ⁵⁵¹ was paid off. Again, the plea does not allege when Mrs. Warfield died, or that she had been dead for twenty years before this suit was brought. Therefore, the concluding part of the plea could not apply in bar of these plaintiffs. The agreed statement of facts shows that she did not die until 1904, and

hence there could have been no amendment which would have been of any avail in reference to that. Until her death, the remaindermen could not have sustained an action of ejectment, as their right to possession did not accrue until the life estate was ended. It is not easy to understand just what was meant by the conclusion of the plea. If it was intended simply to set up a holding by adversary possession, the plea was bad, because that was not an equitable defense, but one at law, in addition to the fact that it does not allege that the possession was adverse. It alleges in one place that the payment of the mortgage put the defendants and those under whom they claim in the shoes of Clara A. Ross, and in another that they had been in constant, uninterrupted and exclusive possession of the property, "a period of over twenty years, without any recognition of the mortgage title or any account on the footing thereof." It therefore cannot be set up as an existing mortgage in default, as a bar to this action. For these and other reasons the demurrer to the plea was properly sustained.

4. After what we have said it is not necessary to discuss the prayers in detail. The concluding part of the defendant's first is clearly erroneous. The title to said land passing under the mortgage foreclosure was not "now vested in the defendants," because the life tenant was then dead and the possession by the defendants was not a bar to recovery by the plaintiffs. The second is also defective, because possession was not held against the appellees since 1873, and there was no evidence that the appellants were claiming under the mortgage offered in evidence. The third was also bad, because it was not necessary that the mortgage be satisfied by the mortgagee or the plaintiffs in this suit. It was satisfied by the sale—at least the attorney of the mortgagee received more than sufficient to ⁵⁵² satisfy it, and presumably did. So far as the fourth is concerned, it is only necessary to say that there was no evidence that the defendants had been in possession since July, 1871, and if they had, these plaintiffs could not sue until 1904. The fifth was properly rejected because there was legally sufficient evidence to entitle the plaintiffs to recover. The plaintiff's second prayer was the converse of that, and under the pleadings and evidence we think they were entitled to recover, as the facts necessary to recover were either admitted by the agreed statement of facts, or proven by the record evidence, which was not contradicted. The court was

only required to apply the law to the uncontradicted and conceded facts. It is unnecessary to discuss the first prayer of the plaintiff.

We will only add that while we hold that the plaintiffs are entitled to recover in this action, we do not mean to preclude the defendants from going into equity and seeking to be subrogated to the purchase money mortgage. That was a part of the consideration by which the life tenant and remaindermen acquired their interest in this land, and equity and justice demand that it should be paid, unless it is clearly established that it was intended to sell the life estate alone, or that the appellants are in some way barred of this relief. The peculiar circumstances of this case are such that it would have been almost impossible to properly set up the claim of subrogation by the plea on equitable grounds, so as to do justice between the parties. If the plea had been technically good, the court would have been justified in striking it out under section 88 of article 75 of the code. In *Park Assn. v. Shartzner*, 83 Md. 10, 34 Atl. 536, this court declined to continue an injunction to restrain the plaintiff from prosecuting an action of ejectment, on the ground that the defendant could introduce in the action at law, by equitable plea, the same matters attempted to be set up in the equity proceeding, but it did not mean to say that a defendant in an ejectment proceeding should in all cases be precluded from going into equity, after judgment, because he had not interposed a plea by way of equitable defense. The statute itself recognizes the fact that ⁵⁵³ there may be cases where justice to all the parties may require the interposition of a court of equity, and this is, in our opinion, such a case. As this court declined to determine in 38th Md. what interest the purchaser had acquired, the appellants had the right to have that determined in this case, and it would not have been right to require them, especially as they were simply the representatives of the heirs, to admit that the sale was only valid to pass the life estate, and then seek to be subrogated to the rights of the mortgagee under the first mortgage. *Union Hall Assn. v. Morrison*, 39 Md. 281, is another illustration of a case where the defendant, in an action of ejectment, should not be prohibited from afterward going into equity, to obtain relief for improvements innocently put upon land recovered from him, merely because he did not set up the defense by way of plea on equitable grounds. He should be permitted to first have the title determined at law.

Other instances might be given, but we do not deem it necessary.

Of course we do not mean to be understood as determining that the appellants will be entitled to relief in equity to the extent of the purchase money mortgage, or expressing an opinion on the subject, as that must depend upon the circumstances shown, but in view of the facts disclosed by this record and some apparent misapprehension by the profession as to the effect of our decisions on this question, we deem it proper to say what we have.

It follows from what we have said that the judgment must be affirmed.

Judgment affirmed, appellants to pay the costs.

Powers of Sale given in wills should receive a liberal construction in order to carry out the purpose and intent of the testator: *Matthews v. Capshaw*, 109 Tenn. 480, 97 Am. St. Rep. 854.

A Power to Sell Lands does not ordinarily include a power to mortgage: *Stokes v. Payne*, 58 Miss. 614, 38 Am. Rep. 340. This rule, however, is not always strictly enforced: *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762; *Faulk v. Dashiell*, 62 Tex. 642, 50 Am. Rep. 542; *Kent v. Morrison*, 153 Mass. 137, 25 Am. St. Rep. 616. When a devisee for life is made executrix with power to sell the real estate, a mortgage executed by her binds the remaindermen: *McCreary v. Bamberger*, 151 Pa. 323, 31 Am. St. Rep. 760.

A Testamentary Power of Sale does not ordinarily confer power to make partition: *Carr, Petitioner*, 16 R. I. 645, 27 Am. St. Rep. 773.

The Right to Subrogation is the subject of a note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 474.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

BIGGERT v. STRAUB.

[193 Mass. 77, 78 N. E. 770.]

GARNISHMENT of Debt Due to a Nonresident.—The liability of a corporation upon a policy of life insurance issued by it, but held by a citizen and resident of another state, is subject to equitable process of garnishment in Massachusetts, which is the domicile of the corporation, so as to give the courts of that state jurisdiction to enter a decree against it. (p. 450.)

GARNISHMENT—Contingent Rights.—One whose interest in an insurance policy depends on his survival of another has an interest the value of which can be ascertained by appraisal, or sale, or other means within the ordinary procedure of the court, and such interest is therefore subject to equitable trustee process under the statutes of Massachusetts. (p. 451.)

Bill in equity against Charles L. Straub and wife of Pittsburgh, Pennsylvania, temporarily residing in Brooklyn, New York, and the Mutual Life Assurance Company, a Massachusetts corporation, for the purpose of ascertaining the interests of the defendants and the complainant and of reaching and applying to the payment of indebtedness a policy of insurance issued by the corporation on the life of the defendant, Charles L. Straub. The defendants Straub were not personally served with process, but there was a service by publication by order of the court. The defendant corporation was served with process, and an injunction issued to prevent its making any payment to the other defendants. The defendants Straub appeared separately and moved to dismiss the bill, but the motion was denied.

C. T. Tatman, for the defendants Straub.

A. T. Johnson, A. H. Bullock and J. M. Thayer, for the plaintiff.

⁷⁸ KNOWLTON, C. J. This is a suit in equity in the nature of an equitable trustee process, brought under the Revised Laws, chapter 159, section 3, clause 7, to reach and apply in payment of a debt due the plaintiff's property in the hands of the defendant life insurance company, belonging to the debtor, Charles L. Straub. This defendant and ⁷⁹ his wife, Bertha G. Straub, the other defendant, who seems to have an interest in the property, are not residents of this commonwealth, and the only service made upon either of them was by publication. They have filed motions to dismiss the suit for want of jurisdiction. The presiding judge overruled these motions and then reported for consideration by this court the questions arising upon them.

The first question is whether a liability of a Massachusetts corporation upon a policy of life insurance held by a citizen and resident of another state is property within this commonwealth, such as to give jurisdiction to the court here to enter a decree in the nature of a judgment in rem against it. This question is precisely the same, in its legal aspect, as the question whether such a liability, in a form that can be reached by trustee process in an action at law, gives jurisdiction for an action of the latter kind. This question has long been treated in this commonwealth as requiring an affirmative answer: *Ocean Ins. Co. v. Portsmouth Marine Ry.*, 3 Met. 420; *Whipple v. Robbins*, 97 Mass. 107, 93 Am. Dec. 64; *American Bank v. Rollins*, 99 Mass. 313; *National Bank of Commerce v. Huntington*, 129 Mass. 444; *Garity v. Gigie*, 130 Mass. 184. In view of conflicting cases in different jurisdictions, it was considered at some length and decided in the affirmative in *Rothschild v. Knight*, 176 Mass. 48, 57 N. E. 337; and it was settled by decisions in the supreme court of the United States, which is the final arbiter in all controversies as to the validity and effect of judgments of one state in the courts of another state: *Chicago etc. Ry. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. Rep. 797, 43 L. ed. 1144; *King v. Cross*, 175 U. S. 396, 20 Sup. Ct. Rep. 131, 44 L. ed. 211; *Rothschild v. Knight*, 184 U. S. 334, 22 Sup. Ct. Rep. 391, 46 L. ed. 573; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439. The defendants' objection to the jurisdiction on this ground is not sustained.

The only question is whether the property is of such a nature as to come within the statute. The State Mutual Life Assurance Company issued a policy of insurance on the life of

the defendant, Charles L. Straub, in the sum of ten thousand dollars, for the term of thirty-two years from May 7, 1895, promising to pay this amount to him or his assigns on May 7, 1927, or, in the event of his death before that date, to pay it to his wife, the defendant, Bertha G. Straub. It appears that this policy now has a cash ^{so} surrender value of more than three thousand dollars. It further appears that the policy is in the possession of the insurance company, which has a lien upon it for twelve hundred and eighty-one dollars, advanced to the defendant, Charles L. Straub.

The policy is not before us, and the only knowledge we have of its terms or provisions is derived from the averments in the stating part of the bill. Nor do we know whether the proceedings that have been had, or the assignment to the insurance company which we infer has been made as security for the advance of money, are such as leave the defendant, Bertha G. Straub, without further interest in the policy. From the averments of the bill the debtor, Charles L. Straub, appears to have, at the least, an interest in the policy whose value depends in great measure upon the contingency of his survival of his wife. If he has no greater interest, this question arises, whether, in view of this contingency, the value of his interest "can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court": See Rev. Laws, c. 159, sec. 3, cl. 7. On this question the case of *Alexander v. McPeck*, 189 Mass. 34, 75 N. E. 88, is decisive. It was there held that a right whose value depended on a similar contingency could be reached under this statute, and that, for the purposes of the statute, the value could be ascertained by sale, or some other means within the ordinary procedure of the court.

Motions disallowed.

The Garnishment of debts not yet due is discussed in *Roberts v. Burns*, 48 W. Va. 92, 86 Am. St. Rep. 17; *Henry v. McNamara*, 124 Ala. 412, 82 Am. St. Rep. 183. The garnishment of debts due nonresidents is discussed in *National Broadway Bank v. Sampson*, 179 N. Y. 213, 103 Am. St. Rep. 851, and cases cited in the cross-reference note thereto. The garnishment of foreign corporations is discussed in *Krafoe v. Roy*, 98 Minn. 141, 116 Am. St. Rep. 346, and cases cited in the cross-reference note thereto. And the situs of debts generally for the purpose of garnishment is the subject of a note to *National Bank v. Furtick*, 69 Am. St. Rep. 113.

ANDREWS v. WILLIAMSON.

[193 Mass. 92, 78 N. E. 737.]

LANDLORD AND TENANT, Duty of the Former as to Stairway Used in Common by Tenants.—With respect to the repair of a stairway over which the tenants have only a right of way in common and which is kept within the control of the landlord, he owes the duty of due care to keep it in the condition in which it was, or appeared to be, at the time of the letting, but he is not bound to change the mode of construction. (p. 453.)

LANDLORD AND TENANT, Duty of the Former to Keep Up the Apparent Condition of the Property.—If, at the time of the letting of property to tenants, certain steps used by them in common and kept within the control of the landlord appear to be strong and sufficient, it is his duty to keep them in the condition in which they thus appear to be. (p. 454.)

Actions for tort to recover for injuries received by Margaret Andrews from the breaking of steps of the house owned by the defendant, Helen Williamson. She requested that the jury be instructed, first, that there was not sufficient evidence to warrant a verdict for the plaintiff; second, that the plaintiff could not recover unless the steps became defective after the leasing; and further, that there was no implied undertaking on the part of the landlord to make things better than they were. These requests were refused, and the defendant excepted to their refusal and also "to such part of the charge as states that the landlord is liable if she knew, or could know, of the defect." Verdict for the plaintiff in both actions.

C. W. Noyes and J. R. Wellman, for the defendant.

N. P. Brown and E. L. Sweetser, for the plaintiffs.

⁹³ **HAMMOND, J.** These two actions were tried together. At the trial it was admitted that the defendant was the owner of the premises where the accident occurred, and that at the time of the accident the relation of landlord and tenant existed between the defendant and the plaintiff, Russell E. Andrews. The evidence was undisputed that the plaintiffs began to occupy the premises in February, 1902, and had continued such occupation up to the time of the accident which occurred in June, 1903; that the building "was a double tenant house with an upper and lower flat," the plaintiffs occupying the lower flat, and one Davis occupying the upper flat; that there was a front entrance to the house, and a side entrance; that at the side entrances there was a flight of five steps used in com-

mon by both tenants; and that these steps were all out of doors, being the means of entrance to the side door. The plaintiff, Margaret, the wife of the plaintiff Russell, was injured by the breaking of one of these steps as she was passing over it.

At the trial, it seems to have been assumed that the steps were not leased to either tenant, but were retained in the control of the defendant, and the arguments before us have proceeded upon the same assumption. The question, therefore, in substance may be stated thus: What is the nature of the duty owed by a landlord to a tenant as to the care and repair of a stairway over which the tenants have only a right of way in common, and which is kept within the control of the landlord?

²⁴ In *Quinn v. Perham*, 151 Mass. 162, 23 N. E. 735, the law on this subject is thus stated by C. Allen, J.: "The general rule that a landlord does not by implication warrant the fitness for use of a demised tenement is not applicable to a common passage owned by the landlord, by which several tenements demised by him are reached: *Watkins v. Goodall*, 138 Mass. 533. The landlord's duty in respect to such passage is that of due care to keep it in such condition as it was in, or purported to be in, at the time of the letting. But he is not bound to change the mode of construction: *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 45 Am. Rep. 344; *Lindsey v. Leighton*, 150 Mass. 285, 15 Am. St. Rep. 199, 22 N. E. 901. If the only access to demised tenements is by means of a ladder, or a rough, unprotected staircase, which is little better than a ladder, a tenant who enters into possession knowing the facts must be content to take the risk. So if the floor of a passage is laid only with loose boards, he cannot complain that it is not made fast and tight." The phrase "in such condition as it was in, or purported to be in, at the time of the letting" means such condition as it would appear to be to a person of ordinary observation, and has reference to the obvious condition of things existing at the time of the letting. In a word, the landlord is not obliged to change the visible form and mode of construction in order to make the place safe, nor is he bound to remove obvious sources of danger. As to these, the tenant takes the risk. Stated in another way, the general duty is upon the landlord to use reasonable care to keep the stairway safe for his tenants, with the proviso that the tenant impliedly agrees that he will take the arrangement and mode of construction as they manifestly are, and will not

call for any change to relieve from obvious dangers. Whatever may be the rule elsewhere, and notwithstanding some dicta in our reports seemingly to the contrary, such, we think, must be regarded as the law established by the decisions of this commonwealth.

With this view of the law, we proceed to the examination of the particular features of this case. The first request that there was no sufficient evidence to warrant a verdict for the plaintiff was rightly refused. Upon the evidence the jury could have found that the steps were apparently sound at the time of the letting, that the plaintiff was in the exercise of due care, and ⁹⁵ that the defendant did not exercise due care to keep the steps in the condition in which they appeared to be at the time of the letting. The second and third requests also were properly refused. They did not properly state the law. The exceptions to the refusal to give these rulings are therefore untenable.

The record states that the defendant also excepted to "such part of the charge as states that the landlord is liable if she ought to have known of the defect." In considering this exception we have been somewhat embarrassed by the way in which the case comes to us. The whole charge, covering four and a half printed pages, is before us, and neither in the record nor in the brief of the defendant is there any specification of the precise words upon which the exception is based. The defendant, however, contends at the end of the brief that "the court, in its charge to the jury and in its refusal to give the instructions requested, substantially made the defendant landlord an insurer of her tenants against injury arising in any manner whatsoever from defects in common passageways, irrespective of their condition at the time of the letting."

We have examined the charge and do not find this criticism well founded. Taking the charge as a whole, and the various sentences in their proper setting, and applying them to the particular facts of this case, the fair construction of it upon this point is that, if the defect of which the plaintiffs complain was obvious at the time of the letting, then the defendant was not liable; but that if the steps appeared strong and safe at the time of the letting, then the defendant was bound to use due care to keep them in the condition in which they thus appeared to be. As thus construed the charge was apt and correct.

Exceptions overruled.

Where a Landlord Lets different portions of a building to different tenants, he owes to them the duty of reasonable care to see that the stairs, hallways, and other parts of the premises used by them in common are in a safe condition for use: See the note to *Griffin v. Jackson Light etc. Co.*, 92 Am. St. Rep. 520; *Siggins v. McGill*, 72 N. J. L. 263, 111 Am. St. Rep. 666; *Widing v. Penn Mutual Life Ins. Co.*, 95 Minn. 279, 111 Am. St. Rep. 471.

TOOLE v. CRAFTS.

[193 Mass. 110, 78 N. E. 775.]

WAIVER in Ignorance of Legal Effect of Known Pre-existing Facts.—If one who signs a waiver of demand, notice and protest of a promissory note knows of the absence of such demand, notice and protest, his waiver is effective, though he did not know that such absence had relieved him from liability. (p. 456.)

FRAUD, Evidence of.—In an action against an indorser of a note who had been released by the failure to make demand for payment and give notice of dishonor, but who had thereafter executed a written waiver of such demand and notice, and claims that such waiver was procured by fraudulent misrepresentation, he should be permitted to testify that when he signed the waiver he did not know that he had been released from liability. Such evidence, though not admissible for the purpose of diminishing the effect of the waiver, is relevant upon the issue of fraud. (pp. 456, 457.)

Action against the maker and indorser of a promissory note. The former did not defend. Verdict and judgment for the plaintiff, and the indorser appealed.

A. L. Green and F. F. Bennett, for the defendant.

C. T. Callahan, for the plaintiff.

HAMMOND, J. This is an action upon a promissory note dated April 2, 1900, signed by the defendant, Howard A. Crafts, and payable to the order of plaintiff on demand. Before its delivery to the plaintiff, the other defendant, Linus D. Crafts, who alone defends, placed his name upon the back of it. He is therefore liable only as an indorser: Stats. 1898, c. 533, sec. 63, now Rev. Laws, c. 73, sec. 80. No demand sufficient to charge him as indorser ever was made upon the maker, and, if the matter had stood there, his defense would have been perfect. But the matter did not stand there. Upon June 27, 1904, when the time for making a demand upon the maker sufficient to charge the indorser had expired, a

conversation took place between one Allyn, the attorney for the plaintiff, on the one hand, and Linus on the other, during which the former wrote upon the back of the note, and the latter signed a waiver of "demand, notice and protest." The evidence as to the tenor of the conversation was conflicting, and one question was whether the waiver had reference to a demand, notice and protest which ought to have been made in the past in time to charge the indorser, or to a demand, notice and protest which the plaintiff was about to make. This question was submitted to the jury with proper instructions. The verdict shows that the jury found that the language had reference to the past.

The defendant contended that at the time he signed the waiver he was not aware that he had been freed from his liability, but the judge rightly ruled that if he knew the facts which released him, his ignorance as to their legal effect would not save him from the consequences of the waiver: *Third Nat. Bank v. Ashworth*, 105 Mass. 503.

¹¹² The defendant contended that he was induced to sign the waiver by the false and fraudulent representations of Allyn acting for the plaintiff. This question was submitted to the jury under quite full instructions. The defendant has complained of those instructions, but we have not had occasion to consider them, because we are of opinion that a new trial must be had for error in the exclusion of the evidence bearing upon this part of the defense.

To make good his defense of fraud the defendant was bound to show not only that the representations were false and fraudulent, but that in reliance upon them he was induced to act as he did. Upon this branch of the defense, the operation of his mind was for the consideration of the jury, and on that subject he was a competent witness: *Knight v. Peacock*, 116 Mass. 362. He offered to show by his own testimony that at the time he signed the waiver he did not know that he had been relieved from liability on the note. This evidence was excluded. While, as above stated, it was not admissible to relieve him from the consequences of his waiver in the absence of fraud, yet upon the question of whether the representations of Allyn were the real and effective inducement to his action, it was admissible. It might well be that a man believing himself to be liable upon a note could be more easily influenced to sign such a waiver than one who believed himself free from liability. A reading of the record shows that this

evidence was offered at the stage of the defense in which the defendant was trying to prove the fraud. It should have been admitted. Its exclusion may have worked harm to the defendant. It becomes unnecessary to consider the other objections to the exclusion of evidence. They may not arise again.

Exceptions sustained.

If an Indorser of a Note indorses thereon a waiver of protest, one year and a half after its maturity, with knowledge that no demand for payment has been made or notice of dishonor given him, he becomes liable on the note: *Burgettstown Nat. Bank v. Hill*, 213 Pa. 456, 110 Am. St. Rep. 554.

An Indorser's Promise to Pay a note after failure to notify him of presentment and dishonor is binding upon him if he knew that no notice had been given, though he did not know the legal effect of such omission: *Glidden v. Chamberlain*, 167 Mass. 486, 57 Am. St. Rep. 479.

ORMANDROYD v. FITCHBURG AND LEOMINSTER STREET RAILWAY COMPANY.

[193 Mass. 130, 78 N. E. 739.]

A STREET RAILWAY CORPORATION is not Liable to a Passenger in an Open Car injured by being struck by the wadding of a cannon fired with a blank cartridge by a citizen, who, with and by the firing of such cannon, was, and during the day preceding had been, celebrating the Fourth of July, though the car was not stopped on approaching the place where the cannon was being discharged, nor were any precautions taken to guard the passengers against injurious consequences. (p. 458.)

Tort, joined with a count in contract, to recover for personal injuries to plaintiff while a passenger on an open car of the defendant street railway company. She was struck by the wadding of a cannon eighteen inches long, mounted on a wooden block six inches high, discharged by a citizen in his dooryard, upon a public street. The superintendent of the defendant knew that for many years before the happening of the accident, there was a great deal of discharging of firearms in the city on the Fourth of July. The car was not stopped on approaching the place where the cannon was being discharged, nor were any precautions taken to guard the passengers against the consequences of such discharge. The cannon had been discharged at various times preceding on the same day, and was easily seen from the defendant's track.

The trial judge ruled that the plaintiff could not recover, and ordered a verdict for the defendant.

C. H. Blood, for the plaintiff.

C. F. Baker and W. P. Hall, for the defendant.

¹³¹ HAMMOND, J. The evidence did not warrant a finding of negligence on the part of the defendant. The accident happened about half-past 5 in the afternoon of July 4, 1905. With the exception of one or two rests, each lasting less than ¹³² an hour, one Ouellet, who seems to have devoted the day to a patriotic celebration, had been discharging the cannon "practically all day since 4 o'clock in the morning until the time of the accident, as often as it could be loaded, which took from five to fifteen minutes." Ever since half-past 5 in the morning the cars of the defendant had been passing by this locality, so that up to the time of the accident several hundred cars had passed. It was a day for fireworks of every description. The cannon was loaded with blank cartridges, and was in Ouellet's yard, quite a distance from the street, sending out "a jet of flame and a volume of smoke as far as the sidewalk," several feet short of the defendant's car tracks. The defendant had no reason to anticipate any danger to its passengers from such a source. Nor was it bound to stop its car and investigate for the purpose of seeing whether the cannon was properly loaded or pointed. The firing had been going on all day, and, in the absence of any indication to the contrary, the defendant had the right to assume that it was not a hostile demonstration against the travelers upon the highway, but was a simple ebullition of patriotic emotion, and, as such, was harmless. To require a street railway corporation to have a general oversight of the details of such exhibitions along the line of the highway on the anniversary of the Declaration of Independence, and to hold it responsible for the consequences to its passengers of any neglect of the exhibitors, would be unreasonable. Such care would be inconsistent with the proper transaction of the business. It might keep the passengers safe, but the cars would practically be at a standstill most of the time, and their proper efficiency would be greatly impaired. The case widely differs from those cases where the railway corporation has reason to anticipate danger from a crowd of rioters or from other causes.

Exceptions overruled.

The Duty and Liability of Street Railway Companies to their passengers are discussed in the note to Thompson v. Gardner etc. Street Ry. Co., post, p. 459. As to the duty of a carrier to protect its passengers from exterior assaults by third persons, see Spangler v. St. Joseph etc. Ry. Co., 68 Kan. 46, 104 Am. St. Rep. 391; Fewings v. Mendenhall, 88 Minn. 336, 97 Am. St. Rep. 519; Brunswick etc. R. R. Co. v. Ponder, 117 Ga. 63, 97 Am. St. Rep. 152.

THOMPSON v. GARDNER, WESTMINSTER AND
FITCHBURG STREET RAILWAY COMPANY.

[193 Mass. 133, 78 N. E. 854.]

A STREET RAILWAY COMPANY is not Responsible for the Condition of a Street, nor answerable to passengers injured by its want of safety. (p. 460.)

A STREET RAILWAY COMPANY is not Under Any Duty to Caution Passengers in alighting from cars against stepping into a gutter or defect in the street for the existence of which the corporation is not blamable, and a passenger injured by so stepping cannot recover. (p. 460.)

J. F. McGrath and J. P. Carney, for the plaintiffs.

J. A. Stiles, for the defendant.

133 HAMMOND, J. These two actions brought to recover damages by reason of injuries received by the plaintiff in the first action were tried together. We shall speak only of the first, because the second stands or falls with it.

The defendant's track ran by the side of the road; and between the track and the sidewalk there was a gutter in the form of a ditch about one foot wide, and about one foot deep, the nearest line of the ditch being two and one-half feet from **134** the nearest rail of the track. The car stopped for passengers to alight. It was about 8 o'clock in the evening of the sixteenth day of August. As to the circumstances the plaintiff testified that when the car stopped she stood up to get off on the "usual side," "the left-hand side"; that "there were people standing between the seats and between her and the left-hand side (which was the street side); that she was standing facing the front of the car with her right hand toward the sidewalk; that she saw the conductor go around to the sidewalk side of the car; that he passed right by them [herself and

a little girl who was with her] and did not offer to help her off; that she heard one bell rung, and [the] little girl who was with her hopped off, and then another bell rung, and she stepped onto the running-board, and then stepped off (on sidewalk side) from the car, as she thought the car was going to start up; that she stepped off with the left foot, and stepped right into the ditch; that the bell did not ring but once, and that after the little girl stepped off, it rang again; that when she got onto the running-board she stood facing the sidewalk and looked out toward the sidewalk and saw what she thought was level ground; that there were no lights there; that when she stepped into the ditch she was hurt."

The car did not start until after she had alighted. The place where the car stopped was a part of the highway over which the defendant had no control. The case is thus distinguishable from cases like *Joslyn v. Milford etc. St. Ry.*, 184 Mass. 65, 67 N. E. 866. "The street is in no sense a passenger station, for the safety of which a street railway company is responsible." *Barker, J., in Creamer v. West End St. Ry.*, 156 Mass. 320, 32 Am. St. Rep. 456, 31 N. E. 391, 16 L. R. A. 490. The plaintiff, however, contends that it was the duty of the conductor to caution her against stepping into the gutter, and and that his failure to do so was negligence. But this contention is untenable. Gutters like the one described are not uncommon features of streets in our country towns. They are generally between that part of the highway which is wrought for public travel and the sidewalk. The plaintiff knew that she was alighting from the car upon the "sidewalk side," and the conductor may well have assumed that she was familiar with the existence of gutters and would govern herself accordingly. ¹³⁵ His failure to warn her was not negligence: See *Bigelow v. West End St. Ry.*, 161 Mass. 393, 37 N. E. 367.

It is unnecessary to consider what would have been the duty of the conductor had there been some unusual cavity into which she was likely to fall.

Exceptions in each case overruled.

THE DUTIES AND LIABILITIES OF STREET RAILROAD COMPANIES TO THEIR PASSENGERS.

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I. Scope of Note.

This note will deal with the relationship, duties and liabilities of street railroad companies to their passengers only. The discussion will include inquiry as to who are passengers, when such relation commences and ceases, and the duties of these companies to persons of this character from the commencement to the termination of the relation. The reciprocal obligations which the law requires of passengers to the carrier is also included, as well as the question when the negligence of the company may be considered the proximate cause of an injury sustained. But the duties and liabilities of street railroad companies to their employés, or to pedestrians, drivers of vehicles, to the municipality, or to any other than its passengers, could not be included within the scope of this note without making it unreasonably long, and these questions are reserved for some future note or notes.

II. Explanatory.

Though street railroads are held to be common carriers of passengers for hire, and little, if any, distinction is drawn by the courts between their general duties and liabilities to passengers and those of

other common carriers, still it has been thought best to confine the citations in this note exclusively to cases where the liability of street railroads were involved. This has not been the policy heretofore adopted by writers in discussing this topic, but as every case involving the question of negligence depends largely upon its particular facts and circumstances, it is believed that the note will be found of more practical use if only those cases are referred to where street railroads were involved.

III. Relation to Passengers.

a. **In General.**—That a street railroad company, though not an insurer of the safety of its passengers, is a common carrier of passengers for hire is very generally upheld: *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Goldstein v. People's Ry. Co. (Del.)*, 60 Atl. 975; *Holly v. Atlanta Street Ry. Co.*, 61 Ga. 215, 34 Am. Rep. 97; *North Chicago Street Ry. Co. v. Wrixon*, 51 Ill. App. 307; *Dean v. Chicago etc. Electric Co.*, 64 Ill. App. 165; *West Chicago Street Ry. Co. v. Johnson*, 180 Ill. 285, 54 N. E. 334; *Indianapolis Street Ry. Co. v. Brown*, 32 Ind. App. 130, 69 N. E. 407; *Hutcheis v. Cedar Rapids etc. Ry. Co.*, 128 Iowa, 279, 103 N. W. 779; *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667; *Metropolitan Street Ry. Co. v. Hanson*, 67 Kan. 256, 72 Pac. 773; *Louisville Ry. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Galligan v. Old Colony Street Ry. Co.*, 182 Mass. 211, 65 N. E. 48; *Watson v. St. Paul City Ry. Co.*, 42 Minn. 46, 43 N. W. 904; *Bischoff v. People's Ry. Co.*, 121 Mo. 216, 25 S. W. 908; *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 54 S. W. 470; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537, 77 S. W. 127; *Maggioli v. St. Louis Transit Co.*, 108 Mo. App. 416, 83 S. W. 1026; *Redmon v. Metropolitan Street Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 592, 84 S. W. 26; *Spellman v. Lincoln Rapid etc. Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 55 N. W. 270, 20 L. R. A. 316; *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. 447; *East Omaha Street Ry. Co. v. Gadola*, 50 Neb. 906, 70 N. W. 491; *Kelly v. Metropolitan St. Ry. Co.*, 89 App. Div. 159, 85 N. Y. Supp. 842; *Klinger v. United Traction Co.*, 92 App. Div. 100, 87 N. Y. Supp. 864; *El Paso Electric Co. v. Harry (Tex. Civ. App.)*, 83 S. W. 735; *Contreras v. San Antonio Traction Co. (Tex. Civ. App.)*, 83 S. W. 870; *Reynolds v. Richmond & M. Ry. Co.*, 92 Va. 400, 23 S. E. 770; *Richmond Traction Co. v. Williams*, 102 Va. 253, 46 S. E. 292; *Sears v. Seattle Electric Co.*, 6 Wash. 227, 33 Pac. 389, 1081; *Foster v. Seattle Electric Co.*, 35 Wash. 177, 76 Pac. 995.

b. **Who are Passengers.**—Generally, one who travels by virtue of a contract, express or implied, is a passenger, but one riding on a street-car is none the less a passenger because the conductor fails to collect his fare: *Brennan v. Fair Haven etc. R. Co.*, 45 Conn. 284, 29 Am. Rep. 679. But before the relationship can exist the person must have entered, or be in the act of entering, the conveyance; a mere

contract for future transportation does not create the relation: *Donovan v. Hartford St. Ry. Co.*, 65 Conn. 21, 32 Atl. 350, 29 L. R. A. 297; *Duchemino v. Boston E. R. Co.*, 186 Mass. 353, 104 Am. St. Rep. 580, and note, 71 N. E. 780, 66 L. R. A. 980. And a child who entered the car with the knowledge and permission of the conductor and was carried several blocks was a passenger, although he did not pay, and did not intend to pay, any fare: *Metropolitan St. Ry. Co. v. Moore*, 83 Ga. 453, 10 S. E. 730. One riding on a street-car is presumed to be a passenger. Hence, affirmative proof of payment of fare is not necessary: *West Chicago St. Ry. Co. v. Manning*, 170 Ill. 417, 48 N. E. 950. But one who gets on a street-car without the intention of paying fare and intending to ride only a short distance and jump off is not a passenger: *Muelhansen v. St. Louis Ry. Co.*, 91 Mo. 332, 2 S. W. 315. A person riding free is a passenger: *Indianapolis Traction Co. v. Lawson*, 143 Fed. 834. For note showing who are passengers on street railways, see 104 Am. St. Rep. 584. The difficulty which most frequently arises in determining who is a passenger is with reference to those who hold transfers to connecting lines which are for some reason defective. The authorities are conflicting as to the relationship which holders of such transfers occupy toward the company, and further light will be thrown on this when we consider the performance of the contract of transportation, and the ejection of passengers, but in some jurisdictions it is held that one who has paid his fare and been given a transfer punched for an earlier hour than it should be, and boards a car on the connecting line within the life of the transfer, had it been properly punched, is a passenger: *Little Rock Ry. etc. Co. v. Goener*, 80 Ark. 158, 95 S. W. 1007; *Citizens' Electric Co. v. Clark*, 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53; *Perine v. North Jersey St. Ry. Co.*, 69 N. J. L. 230, 54 Atl. 799; *Jacobs v. Third Ave. R. Co.*, 71 App. Div. 199, 75 N. Y. Supp. 679; *O'Rourke v. Citizens' Street Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872, 46 L. R. A. 614; *Memphis St. Ry. Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803, 75 S. W. 729; *Lawshe v. Tacoma St. Ry. etc. P. Co.*, 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350. These decisions are based upon the apparently reasonable theory that a passenger is not charged with the duty of examining a transfer given to him by the company's servant to see if it is correct. There are authorities, however, which hold differently: *Norton v. Consolidated Ry. Co.*, 79 Conn. 109, ante, p. 132, 63 Atl. 1087; *Hornesby v. Georgia Ry. & Electric Co.*, 120 Ga. 913, 48 S. E. 339; *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794, 52 L. R. A. 626.

c. **When does the Relationship Cease.**—The authorities are not harmonious upon the question when a passenger on a street-car ceases to be such. In 1 *Fetter on Carriers of Passengers*, section 233, it is announced that: "When a passenger steps from a street-car to the street, he becomes a traveler on the public highway, and terminates

his relation and rights as a passenger, and the company is no longer responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk''; and in some jurisdictions this doctrine is strongly upheld: *Indianapolis St. Ry. Co. v. Tenner*, 32 Ind. App. 311, 67 N. E. 1044; *Creamer v. Street Ry. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456, 31 N. E. 391, 16 L. R. A. 490; *Buzley v. Scranton Traction Co.*, 126 Pa. 559, 12 Am. St. Rep. 919, 17 Atl. 895; *Smith v. City etc. St. Ry. Co.*, 29 Or. 539, 780, 46 Pac. 136; while in others it is insisted that the relationship does not cease immediately upon the passenger safely leaving the car, but continues until he has safely crossed any parallel track of the same company: *South Covington etc. Ry. Co. v. Beatty*, 20 Ky. Law Rep. 1845, 50 S. W. 239. And in reference to passengers holding transfers to connecting lines it has been held that they are passengers while making the transfer from one car to the other: *Citizens' St. Ry. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014; *Waljer v. Jersey City etc. St. R. Co. (N. J.)*, 59 Atl. 14; *Keator v. Scranton Traction Co.*, 191 Pa. 102, 71 Am. St. Rep. 758, 43 Atl. 86, 44 L. R. A. 546, where it is held that the relationship continued until the passenger was safely aboard the connecting line, although the passenger had to walk a block before reaching the starting point of the terminal line, and the company was held liable to him as a passenger for an injury caused by the breaking of the trolley-pole on the terminal car while it was being changed by the conductor, and before the person holding the transfer had boarded the car. This case is of special importance, because it was admitted by plaintiff's counsel that unless the relationship of passenger existed the carrier would not be responsible for the injury.

IV. Performance of Contract of Transportation.

a. **In General.**—A street railway company is bound to transport its passengers to their destination on its line and give them an opportunity to safely alight: *Atlanta Consol. Ry. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41; *Indianapolis Ry. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399. And on this point there is no conflict of authority, but as to the duty of these corporations to transport passengers holding transfers to connecting lines, is a question upon which the authorities are conflicting.

b. **Transfers to Connecting Lines.**—There are some decisions to the effect that when the company voluntarily permits a passenger to transfer, without additional fare, the passenger must tender to the conductor of the connecting line a transfer check within the limit of the time punched, and this though the transfer had been erroneously punched: *Norfolk v. Consolidated Ry. Co.*, 79 Conn. 109, ante, p. 132, 63 Atl. 1087; *Hornesby v. Georgia Ry. & Electric Co.*, 120 Ga. 913, 48 S. E. 339; *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794, 52 L. R. A. 626. Others hold that it is the duty of the conductor giving the transfer to know that it is correctly punched, and if it is not, that the holder is nevertheless en-

titled to be transported on the connecting line: *Citizens' St. Ry. Co. v. Clark*, 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53; *Perine v. North Jersey St. Ry. Co.*, 69 N. J. L. 238, 54 Atl. 799; *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872, 46 L. R. A. 614; *Memphis St. Ry. Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803, 75 S. W. 729; *Lawshi v. Tacoma St. Ry. Co.*, 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350.

V. Degree of Care Required for Safety of Passengers.

a. **In General.**—While there is some difference in the language used by the different courts in expressing the doctrine as to the degree of care required of street railway companies for the safety of their passengers, the doctrine supported by the overwhelming weight of authority is, that these companies are bound to exercise the highest degree of care and skill consistent with the character of their undertaking and the practical operation of their business: *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Goldstein v. People's Ry. Co. (Del.)*, 60 Atl. 975; *Holly v. Atlanta St. Ry. Co.*, 61 Ga. 215, 34 Am. Rep. 97; *North Chicago St. Ry. Co. v. Wrixon*, 51 Ill. App. 307; *West Chicago St. Ry. Co. v. Johnson*, 180 Ill. 285, 54 N. E. 334; *Fisher v. Chicago City Ry. Co.*, 114 Ill. App. 217; *Chicago City Ry. Co. v. Morse*, 197 Ill. 327, 64 N. E. 304; *North Chicago St. Ry. Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793; *Tri-City Ry. Co. v. Gould*, 217 Ill. 317, 75 N. E. 493; *Indianapolis St. Ry. Co. v. Brown*, 32 Ind. App. 130, 69 N. E. 407; *Hutcheis v. Cedar Rapids etc. Ry. Co.*, 128 Iowa, 279, 103 N. W. 779; *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667; *Metropolitan St. Ry. Co. v. Hanson*, 67 Kan. 256, 72 Pac. 773; *Louisville Ry. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Davis v. Paducah Ry. etc. Co.*, 24 Ky. Law Rep. 135, 68 S. W. 140; *Kuhlen v. Boston & Northern Street Ry. Co.*, 193 Mass. 341, post, p. 516, 79 N. E. 815; *Gallighan v. Old Colony St. Ry. Co.*, 182 Mass. 211, 65 N. E. 48; *Smith v. St. Paul etc. Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550; *Watson v. St. Paul etc. Ry. Co.*, 42 Minn. 46, 43 N. W. 904; *Buck v. People's St. Ry. etc. Co.*, 46 Mo. App. 555; *Bischoff v. People's etc. Ry. Co.*, 121 Mo. 216, 25 S. W. 908; *Olsen v. Citizens' Ry. etc. Co.*, 152 Mo. 426, 54 S. W. 470; *Powers v. Union Ry. Co.*, 60 Mo. App. 481; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537, 77 S. W. 127; *Maggioli v. St. Louis Transit Co.*, 108 Mo. App. 416, 83 S. W. 1028; *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26; *Nelson v. Metropolitan St. Ry. Co.*, 113 Mo. App. 702, 88 S. W. 1119; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 55 N. W. 270, 20 L. R. A. 316; *Lincoln St. Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; *Lincoln Traction Co. v. Webb (Neb.)*, 102 N. W. 258; *Omaha St. Ry. Co. v. Boesen (Neb.)*, 105 N. W. 303; *Scott v. Bergen County Traction Co.*, 64 N. J. L. 362, 48 Atl. 1118; *McSwyng v. Broadway etc. Ry. Co.*, 54 Hun, 637, 7 N. Y. Supp. 456;

Kelly v. Metropolitan St. Ry. Co., 89 App. Div. 159, 85 N. Y. Supp. 842; Frank v. Metropolitan St. Ry. Co., 91 App. Div. 485, 86 N. Y. Supp. 1018; Klinger v. United Traction Co., 92 App. Div. 100, 87 N. Y. Supp. 864; Horan v. Rockwell, 110 App. Div. 522, 96 N. Y. Supp. 973; Citizens' Ry. Co. v. Craig (Tex. Civ. App.), 69 S. W. 239; El Paso Electric Co. v. Harry (Tex. Civ. App.), 83 S. W. 735; Contreras v. San Antonio Traction Co. (Tex. Civ. App.), 83 S. W. 870; Paul v. Salt Lake City Ry. Co., 30 Utah, 41, 83 Pac. 563; Reynolds v. Richmond Ry. Co., 92 Va. 400, 23 S. E. 770; Richmond Traction Co. v. Williams, 102 Va. 253, 46 S. E. 292; Sears v. Seattle Consol. St. Ry. Co., 6 Wash. 227, 33 Pac. 389, 1081; Foster v. Seattle Electric Co., 35 Wash. 177, 75 Pac. 995; Wanzer v. Chippewa etc. Electric Co., 108 Wis. 319, 84 N. W. 423.

In *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 55 N. W. 270, 20 L. R. A. 316, a passenger was injured by derailment of the car, and the company was required to show that it was due to causes "wholly beyond its control, and that it had not been guilty of the slightest negligence contributory thereto, and that by the exercise of the utmost human care, diligence and foresight the casualty could not have been prevented." And where a passenger was injured by reason of a defect in a street-car the company was not excused, because its cars had been recently inspected by a competent employé: *Davis v. Paducah Ry. Co.*, 24 Ky. Law Rep. 135, 68 S. W. 140. In *Smith v. St. Paul etc. Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, the company was adjudged liable for injury to a passenger if it was guilty of the "slightest negligence." But a somewhat different doctrine is announced in *Kight v. Metropolitan St. Ry. Co.*, 21 App. D. C. 494, where the company was held not liable for injury to a passenger which could not have been prevented by the exercise of reasonable foresight.

b. **To Persons Under Disability.**—It is the duty of those in charge of the cars of a street railway company to exercise greater care toward disabled persons than to other passengers, but the disability must be apparent or must be brought to their knowledge: *Connelly v. Crescent City Ry. Co.*, 41 La. Ann. 57, 17 Am. St. Rep. 389, 5 South. 259, 6 South. 526, 3 L. R. A. 133. But the conductor's knowledge that a passenger was a particularly sensitive person does not increase the carrier's obligation: *Spade v. Lynn etc. R. R.*, 172 Mass. 488, 70 Am. St. Rep. 298, 52 N. E. 747, 43 L. R. A. 832. The increased obligation, however, extends to aged and infirm persons: *Memphis St. Ry. Co. v. Shaw*, 110 Tenn. 467, 75 S. W. 713; and to children of tender years. Thus, failure to compel a child of four years of age to go inside the car, who was injured by getting off the car while in motion, was actionable negligence, although the conductor had told him to go inside: *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503, and to same effect is *Pittsburg etc. Ry. Co. v. Coldwell*, 74 Pa. 421.

c. **Acts or Omissions of Employés.**—The generally approved doctrine that a common carrier is bound to protect its passengers from

injuries by its servants, acting in the scope of their employment, applies to street railroad companies; and where a passenger was assaulted by a conductor under an honest belief that he was justified in so doing, the company was held liable: *Birmingham etc. Ry. Co. v. Mullen*, 138 Ala. 614, 35 South. 701; and the fact that a passenger called the conductor a vile name did not justify an assault by the conductor: *Hanson v. Urbana & C. Electric Co.*, 75 Ill. App. 474. In *Citizens' St. Ry. Co. v. Clark*, 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53, it is stated that a street railway company is bound to protect its passengers from assault by its servants, and is liable for breach of such duty, regardless of whether the servants acted within the scope of their authority; but this doctrine does not find much support. The fact that a motorman left the car and the conductor operated it alone was not per se such negligence as to render the company liable for injury to a passenger while alighting: *Root v. Des Moines Ry. Co.*, 123 Iowa, 469, 98 N. W. 291. Damages to the feelings and reputation of a passenger caused by the threats and insolence of its servants are recoverable: *Lafitte v. New Orleans City etc. Ry. Co.*, 43 La. Ann. 34, 8 South. 701, 12 L. R. A. 337. The liability of the company for the acts of its servants cannot be avoided by failing to give them instructions or restricting their authority: *Schmidt v. New Orleans etc. Ry. Co.*, 116 La. 311, 40 South. 714, 7 L. R. A., N. S., 162. Where the conductor had notified passengers to transfer to another line and afterward the car stopped before reaching the transfer point, failure of the conductor to warn passengers not to leave the car till further notice subjected the company to liability for an injury to a passenger caused by the car starting while he was alighting: *United Railways etc. Co. v. Woodbridge*, 97 Md. 629, 55 Atl. 444. Where a conductor pushed a passenger off the car and at the same time called a policeman to arrest him, the company was liable to him as a passenger if the arrest was wrongful: *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 60, 71 S. W. 730. But when a passenger got into an altercation with the motorman and left the car, but returned and renewed the difficulty, and the motorman left the car and assaulted him in the street, he was not acting in the scope of his employment, and the company was not liable: *Palmer v. Winston etc. R. & E. Co.*, 131 N. C. 250, 42 S. E. 604.

In *James v. Metropolitan St. Ry. Co.*, 80 App. Div. 364, 80 N. Y. Supp. 710, the company was held liable for an assault by the conductor, though the assault was provoked by the passenger's violence; and in *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 70 N. E. 857, the company was required to answer in damages for insulting language used by the conductor to a passenger.

That a passenger, unable to get the conductor's attention, pulled the cord which registered fares instead of the signal bell, did not justify an assault upon him by the conductor: *Atherholt v. Erie Elec-*

trie Co., 27 Pa. Sup. Ct. 141. The act of a conductor in having a former passenger arrested after ejecting him from the car is beyond the course of his employment, and does not render the company liable for false imprisonment: *Lezinsky v. Metropolitan St. Ry. Co.*, 88 Fed. 437, 31 C. C. A. 573.

d. Acts of Fellow-passengers and Other Third Persons.—While it is the duty of street railroads to use all proper means and precautions to protect their passengers against injury caused by the misconduct of fellow-passengers or other third persons, yet this duty is relative and contingent, and not absolute and unconditional; hence, the company is charged with no greater duty than to protect its passengers from injuries thus sustained, which could have been reasonably anticipated and guarded against: *Holly v. Atlanta St. Ry. Co.*, 61 Ga. 215, 34 Am. Rep. 97; *West Chicago St. Ry. Co. v. Tuerk*, 90 Ill. App. 105; *United Railways etc. Co. v. Dean*, 93 Md. 619, 86 Am. St. Rep. 453, 49 Atl. 923, 54 L. R. A. 924; *Vinton v. Middlesex R. R.*, 11 Allen (Mass.), 304, 87 Am. Dec. 714; *Cobb v. Boston etc. Ry.*, 179 Mass. 212, 60 N. E. 476; *Fewings v. Mendenhall*, 88 Minn. 336, 97 Am. St. Rep. 519, 60 L. R. A. 601, 93 N. W. 127; *Krone v. Southwest etc. Ry. Co.*, 97 Mo. App. 609, 71 S. W. 712; *Putnam v. Broadway etc. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190; *Stutsky v. Brooklyn Heights R. Co.*, 88 N. Y. Supp. 358; *McDonough v. Third Ave. R. Co.*, 95 App. Div. 311, 88 N. Y. Supp. 609; *Fanizzi v. New York etc. R. Co.*, 99 N. Y. Supp. 281; *Muhlhauser v. Monongahela St. Ry. Co.*, 201 Pa. 237, 50 Atl. 937; *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982.

Where a passenger was injured during a stampede caused by the blowing out of a fuse, the company was charged with the duty of using the utmost skill and vigilance to avoid such accident: *Kight v. Metropolitan St. Ry. Co.*, 21 App. D. C. 494. And in *Holly v. Atlanta St. Ry. Co.*, 61 Ga. 215, 34 Am. Rep. 97, failure of the company to employ a suitable conductor to stop a fight on its car, whereby a passenger was injured, was held to be negligence. But where a passenger was tripped up by a drunken passenger, who was being ejected from the car with due care, no negligence could be imputed to the company: *Cobb v. Boston Elevated Ry. Co.*, 179 Mass. 212, 60 N. E. 476. Nor is the company liable for an injury resulting from a panic in the car caused by a passenger's dress being ignited from a lighted match thrown by another passenger: *Fanizzi v. New York etc. R. Co.*, 113 App. Div. 440, 99 N. Y. Supp. 281. And the company is not liable for injury to a passenger from stones thrown in its cars during a strike, there being no indication of danger until the stones were thrown: *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982. In *Fewings v. Mendenhall*, 88 Minn. 336, 87 Am. St. Rep. 519, 93 N. W. 127, 60 L. R. A. 601, it is held that it is not negligence in a street railroad company to operate its cars during a strike, nor is it liable for failure to protect its windows with screens at such

times to prevent passengers from being injured by stones thrown by the mob.

In *McDonough v. Third Ave. R. Co.*, 95 App. Div. 311, 88 N. Y. Supp. 609, no liability was charged to the company for injury to a passenger caused by premature starting of the car upon a signal given by another passenger; and to same effect is *Krone v. Southwest etc. Ry. Co.*, 97 Mo. App. 609, 71 S. W. 712.

e. Condition and Use of Premises.—The rule in reference to railroad companies that they are bound to keep their stations and platforms in a reasonably safe condition seems also to apply to street railroads. For it has been held that where a street-car company adopted a platform and invited the public to use it in getting on and off its cars, it is bound to keep it in a reasonably safe condition, and this duty is required, though the platform is in a public street and was not built by the street railroad company: *Haselton v. Portsmouth etc. St. Ry. Co.*, 71 N. H. 589, 53 Atl. 1016.

f. Sufficiency and Safety of Means of Transportation.—Where a passenger of a street railway company sustains injury, caused by some defect in the car, it is frequently impossible to prove the exact particular in which the car was defective, as it might have been some latent defect, altogether unknown, not only to the passenger, but to the company itself. Therefore, it is the duty of a street-car company to exercise extraordinary care and the utmost diligence in providing and keeping in repair the necessary appliances for the transportation of passengers. Thus, a street-car company is responsible for a defect in its cars which could have been avoided by the utmost care and skill in their construction, though the defects were not discoverable after the cars came into possession of the company itself: *Siemens v. Oakland etc. Electric Co.*, 134 Cal. 494, 66 Pac. 672. And the cars must be so operated that a passenger without warning will not be injured by simply lifting his arm or raising his shoulders: *North Chicago St. Ry. Co. v. Polkey*, 203 Ill. 225, 67 N. E. 792. Operating a car without gates on the platform is not negligence in the absence of a statute requiring them placed there: *Byron v. Lynn etc. Ry. Co.*, 177 Mass. 303, 58 N. E. 1015. But to allow a ring in the floor of a car to remain in such condition that it rises when the car starts and remains standing till replaced is negligence, notwithstanding such ring is a usual device and the car was built by reputable builders: *Kingman v. Lynn etc. Ry. Co.*, 181 Mass. 387, 64 N. E. 79.

It is not necessary to maintain a guard-rail on the side of a car nearest the trolley poles, unless the poles are dangerously near the track: *Bridges v. Jackson etc. Electric Co.*, 86 Miss. 584, 38 South. 788. A street railway company is not liable for injury to a passenger caused by a car escaping down an incline if the best machinery was used in its construction and the accident could not be foreseen: *Feary v. Metropolitan St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452.

But it is bound to keep the hand-rails used in boarding and alighting from the car in proper repair: *McCarty v. St. Louis etc. Ry. Co.*, 105 Mo. App. 596, 80 S. W. 7. The company is liable for an electric shock to a passenger caused by a defect in the electric appliances of the car, the same being regarded as a direct physical assault: *Buckbee v. Third Ave. R. Co.*, 64 App. Div. 360, 72 N. Y. Supp. 217. But it is not charged with the duty of seeing that a window raised by a passenger is at the proper height to prevent its falling, the catches for holding the window not being defective: *Strembel v. Brooklyn Heights R. Co.*, 110 App. Div. 23, 96 N. Y. Supp. 903.

Where a passenger was injured by jumping from a car which, after it had stopped, suddenly started over a railroad crossing, the starting of the car being due to a defect in the controller, the company was liable: *Willis v. Second Ave. Traction Co.*, 189 Pa. 430, 42 Atl. 1. And the company was liable for an injury to a passenger while riding in a defective car which was going to the power-house for repair, he having no notice of its defective condition: *Washington v. Spokane St. Ry. Co.*, 13 Wash. 9, 42 Pac. 628. In the absence of a statute requiring it, a street railroad company is not bound to provide gates for the platforms: *Halverson v. Seattle Electric Co.*, 35 Wash. 600, 77 Pac. 1058. But it must exercise extraordinary care and the utmost diligence in providing and keeping its appliances in repair: *Mannon v. Camden etc. Ry. Co.*, 56 W. Va. 554, 49 S. E. 450. Screens on the lower parts of the car windows are sufficient to relieve the company from liability for injury from the trolley poles: *Christiensen v. Metropolitan St. Ry. Co.*, 137 Fed. 708, 70 C. C. A. 657.

g. Taking Up Passengers.—In taking up passengers the rule seems to be that the company must use the utmost care and diligence of very cautious persons; that the car must come to a full stop at crossings when signaled, and must not start until the passengers have reached a place of safety on the car: *Guenther v. Metropolitan St. Ry. Co.*, 23 App. D. C. 493; *North Chicago St. Ry. Co. v. Cook*, 42 Ill. App. 634; *Indianapolis Traction Co. v. Pressel* (Ind. App.), 77 N. E. 357; *Sharp v. New Orleans City Ry. Co.*, 111 La. 395, 100 Am. St. Rep. 488, 35 South. 614; *Davey v. Greenfield etc. Ry. Co.*, 177 Mass. 106, 58 N. E. 172; *Maxey v. Metropolitan St. Ry. Co.*, 95 Mo. App. 303, 68 S. W. 1063; *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459, 78 S. W. 838; *Stoddard v. St. Louis etc. R. Co.*, 105 Mo. App. 512, 80 S. W. 33; *Lew v. St. Louis Transit Co.*, 106 Mo. App. 329, 80 S. W. 273; *Shanahan v. St. Louis Transit Co.*, 109 Mo. App. 228, 83 S. W. 783; *Lehner v. Metropolitan St. Ry. Co.*, 110 Mo. App. 215, 85 S. W. 110; *Kohr v. Metropolitan St. Ry. Co.*, 117 Mo. App. 302, 92 S. W. 1145; *Schmidt v. North Jersey St. Ry. Co.* (N. J.), 58 Atl. 72; *Goldwasson v. Metropolitan St. Ry. Co.*, 32 Misc. Rep. 682, 66 N. Y. Supp. 505; *Schoenfeld v. Metropolitan St. Ry. Co.*, 81 N. Y. Supp. 644; *Clark v. Durham Traction Co.*, 138 N. C. 77, 107 Am. St. Rep.

526, 50 S. E. 518; Reddington v. Harrisburg Traction Co., 210 Pa. 648, 60 Atl. 305; Hatch v. Philadelphia etc. Ry. Co., 212 Pa. 29, 61 Atl. 480; Norfolk & A. T. Co. v. Morris, 101 Va. 423, 44 S. E. 719; Foster v. Seattle Electric Co., 35 Wash. 177, 76 Pac. 995; Woodman v. Seattle Electric Co., 42 Wash. 406, 85 Pac. 23; Normile v. Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030.

The conductor must watch both ends of the car and see that passengers are safely on board before signaling to start. Waiting a reasonable time is not sufficient, and the fact that the car is crowded so that he could not see is not an excuse, but should rather make him more cautious: Guenther v. Metropolitan St. Ry. Co., 23 App. D. C. 493. Stopping a car at a crossing is an invitation to passengers to board it, and the company must afford a reasonable opportunity to do so: North Chicago St. Ry. Co. v. Cook, 43 Ill. App. 634. And it is the duty of the company's servants to aid passengers to get on the car when the necessity for so doing is apparent or brought to their attention: Indianapolis Traction Co. v. Pressell (Ind. App.), 77 N. E. 357. But after a passenger has reached a place of safety on the car, it is not negligence to start the car while he is passing from the platform to the inside of the car: Sharp v. New Orleans City Ry. Co., 111 La. 395, 100 Am. St. Rep. 488, 35 South. 614. It is the duty of the company to stop long enough to allow all passengers a reasonable time to get on safely, regardless of who gave the signal to stop: Stoddard v. St. Louis etc. Co., 105 Mo. App. 512, 80 S. W. 33; and with due regard to the age and physical infirmities of the persons wishing to get on the car: Shanahan v. St. Louis etc. Co., 109 Mo. App. 228, 83 S. W. 783. But the employes of the company are not charged with the duty of preventing a person from attempting to board a moving car: Lew v. St. Louis etc. Co., 106 Mo. App. 329, 80 S. W. 273. Nor is the company responsible for one injured in attempting to board a car while in motion: Foster v. Seattle Electric Co., 35 Wash. 117, 76 Pac. 995. But where the motorman slowed down to take on a passenger, and quickened the speed while he was getting on, telling him to take the next car, the company was liable for injury he received in being thrown off the car: Schmidt v. North Jersey St. Ry. Co. (N. J.), 58 Atl. 72. It is the conductor's duty to be on the platform when passengers board the car and give assistance, and see that the car does not start till all are safely on board: Clark v. Durham Traction Co., 138 N. C. 77, 107 Am. St. Rep. 526, 50 S. E. 518. And it is also his duty to look on both sides of the track before starting his car to see if all passengers have entered: Reddington v. Harrisburg Traction Co., 210 Pa. 648, 60 Atl. 305.

h. Setting Down Passengers.—A street railroad company is bound to the same degree of care for the safety of a passenger in getting off its cars that it is to one in transit. Hence, when a car stops to allow a passenger to alight, it must remain standing until all who

wish to alight are safely off the car: *Birmingham R. & E. Co. v. Wildman*, 119 Ala. 547, 24 South. 548; *Elwood v. Connecticut Ry. etc. Co.*, 77 Conn. 145, 58 Atl. 751; *Bloomington etc. Ry. v. Zimmerman*, 101 Ill. App. 184; *Springfield Consol. Ry. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884; *Crump v. Davis*, 33 Ind. App. 88, 70 N. E. 886; *Union Traction Co. v. Siceloff*, 34 Ind. App. 511, 72 N. E. 266; *Paducah St. Ry. Co. v. Walsh*, 22 Ky. Law Rep. 532, 58 S. W. 431; *United Railways & E. Co. v. Hertel*, 97 Md. 382, 55 Atl. 428; *Selby v. Detroit Ry.*, 141 Mich. 112, 104 N. W. 376; *Skelton v. St. Paul City Ry. Co.*, 88 Minn. 192, 92 N. W. 960; *Scannell v. St. Louis Transit Co.*, 102 Mo. App. 198, 76 S. W. 660; *Kroner v. St. Louis Transit Co.*, 107 Mo. App. 41, 80 S. W. 915; *McKinstry v. St. Louis etc. Co.*, 108 Mo. App. 12, 82 S. W. 1108. And greater time must be given a passenger to alight who has a child to assist in alighting: *Hammon v. St. Louis etc. Co.*, 102 Mo. App. 216, 77 S. W. 158. A standing car is an invitation to a passenger to alight, and he has the right to assume that the car will not be moved while he is so doing: *Davis v. Camden etc. Ry. Co.*, 73 N. J. L. 415, 63 Atl. 834; *Asbury v. Charlotte Electric Ry. etc. Co.*, 125 N. C. 568, 34 S. E. 654; *Ashtabula R. T. Co. v. Holmes*, 67 Ohio St. 153, 65 N. E. 877; *Memphis St. Ry. Co. v. Shaw*, 110 Tenn. 467, 75 S. W. 713. But where the conductor started the car while a passenger was alighting in order to avoid approaching danger, the company was not guilty of negligence: *Kautrowitz v. Metropolitan St. Ry. Co.*, 63 App. Div. 65, 71 N. Y. Supp. 394. Stopping the car for a reasonable length of time to allow passengers to alight is not sufficient, but the conductor must see that no passenger is in the act of alighting before he starts the car: *Little Rock T. & E. Co. v. Kimbro*, 75 Ark. 211, 87 S. W. 121, 644. When a car was usually stopped at a switch before reaching a crossing, long enough for passengers to alight, extraordinary diligence is required of the company's servants to see if any passenger is alighting before starting the car: *Atlanta Co. v. Randall*, 117 Ga. 165, 43 S. E. 412; *Gilroy v. St. Louis Transit Co.*, 117 Mo. App. 663, 92 S. W. 1152. And while a car is not bound to stop in the middle of a block to let off passengers, yet if it does so upon request of a passenger, the company must use the utmost diligence for his safety in alighting: *West Chicago St. Ry. Co. v. Buckley*, 200 Ill. 260, 65 N. E. 708. Or if the conductor has knowledge that a passenger is alighting from a standing car, the company is negligent if the car is started before he gets off safely, although the car had not stopped for the purpose of allowing passengers to alight: *Bermger v. Dubuque St. Ry. Co.*, 118 Iowa, 135, 91 N. W. 931; *Jacobson v. St. Louis Transit Co.*, 106 Mo. App. 339, 80 S. W. 309. But if the conductor had no notice or knowledge that a passenger was alighting when the car did not stop to discharge passengers, there is no negligence: *Brown v. International St. Ry. Co.*, 87 N. Y. Supp.

461; *McCarty v. International St. Ry. Co.*, 88 N. Y. Supp. 388; *Laverty v. International St. Ry. Co.*, 98 N. Y. Supp. 846.

It is the duty of a street railroad company to know that the place where its cars stop to discharge passengers is a reasonably safe place, and a passenger can assume it is safe, unless obviously dangerous: *Mobile Light & R. Co. v. Walsh*, 146 Ala. 290, 40 South. 559. Therefore, when a car is stopped at night at a place on the street where the city had made excavations, of which the passengers were ignorant, the company was liable for an injury to a passenger who alighted without warning: *Fort Wayne Traction Co. v. Morvilius*, 31 Ind. App. 464, 68 N. E. 304; and the same doctrine is announced in *Sweet v. Louisville R. Co.*, 23 Ky. Law Rep. 2279, 67 S. W. 4; *Joslyn v. Milford etc. St. Ry. Co.*, 184 Mass. 65, 67 N. E. 866. And if the company discharges its passengers on its private way, it is bound by the utmost degree of care in procuring a safe place for them to alight: *Topp v. United Railways etc. Co.*, 99 Md. 630, 59 Atl. 52. If it allows a passenger to alight near a ditch so filled with water as to be indistinguishable, its servants must warn him of the danger if known to them: *McDonald v. St. Louis Transit Co.*, 108 Mo. App. 374, 83 S. W. 1001. The rule holding street-car companies liable for negligence if they fail to provide passengers a place to alight in safety is because the relation of carrier and passenger does not cease until the passenger is safely off the car: *Suef v. St. Louis etc. Ry. Co.*, 112 Mo. App. 74, 86 S. W. 887; *Bass v. Concord St. Ry. Co.*, 70 N. H. 170, 46 Atl. 1056; *Truesdell v. Erie R. Co.*, 99 N. Y. Supp. 694. It is also the duty of a street railway company to provide reasonably safe means for a passenger to get off of its cars: *Neslie v. Second and Third Sts. Passenger Ry. Co.*, 113 Pa. 300, 6 Atl. 72. Thus, when the steps of the car are so high that a passenger cannot conveniently alight, the company is negligent if it fails to furnish a box or platform, or assist the passenger in alighting, or warn him of the danger and give plenty of time: *Truesdell v. Erie R. Co.*, 114 App. Div. 34, 99 N. Y. Supp. 694. But an apparently contrary doctrine is announced in *Indianapolis T. & T. Co. v. Pressell* (Ind. App.), 77 N. E. 357, where no negligence was imputed to the company for the failure of its servants to assist a lady fifty years of age and weighing two hundred pounds in alighting from a car when the steps were three feet above the street. However, in *Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 13 Sup. Ct. Rep. 557, 37 L. ed. 284, the duty of the company to provide safe means for leaving its cars is fully upheld. It is not only the duty of the company to stop a reasonable time to allow passengers to alight and also to see that all have alighted, but also not to start the car until the skirts of a lady passenger are clear of the steps: *Smith v. Kingston City R. Co.*, 169 N. Y. 616, 62 N. E. 1100. And when a conductor who had assisted a lady from the car, whose skirts were not clear of the steps, stepped on her skirt as he reboarded the car,

and she was thrown down, the company was held liable for any injury she sustained thereby: *Citizens' St. Ry. Co. v. Shepherd*, 29 Ind. App. 412, 62 N. E. 300.

It is not, per se, negligence for the motorman to open the gates on the front platform before the car has come to a full stop: *Paginini v. North Jersey St. Ry. Co.*, 69 N. J. L. 60, 54 Atl. 218. As a general rule, a street railway company is not liable to a passenger for an injury he receives in attempting to get off a moving car: *Augusta Ry. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *White v. West End St. Ry. Co.*, 165 Mass. 522, 43 N. E. 298; *Steuer v. Metropolitan St. Ry. Co.*, 46 App. Div. 500, 61 N. Y. Supp. 1059. But it is held in some jurisdictions that if the motorman fails to listen for signals to stop given by a passenger, and as a result the passenger attempts to get off the car while moving and is injured, the company is liable: *Fuller v. Denison St. Ry. Co.*, 32 Tex. Civ. App. 399, 74 S. W. 940; and that if the signal is not observed after being given several times, that negligence on the part of the company will be presumed: *Dallas Rapid Transit Co. v. Payne* (Tex. Civ. App.), 78 S. W. 1085.

1. **Incidental Injuries.**—It would seem that street railway companies must exercise the same degree of care to protect their passengers from incidental injuries that is required of them in regard to injuries inflicted by fellow-passengers and other third persons, and are responsible only for such injuries as could reasonably have been anticipated or guarded against. Thus, where a passenger was injured by a pole nearer the track than usual, the company was held liable: *Salmon v. City Electric Ry. Co.*, 124 Ga. 1056, 53 S. E. 575; and in *Chicago Union Traction Co. v. Newmiller*, 215 Ill. 383, 74 N. E. 410, the company was held liable for injury to a passenger during a rush from the car, caused by an explosion in the controller. Liability was also adjudged where a passenger was injured by being pushed into a pole on a platform used for entering the car upon the theory that the company knew that a crowd was likely to congregate there: *Indianapolis St. Ry. Co. v. Robinson*, 157 Ind. 414, 61 N. E. 936; and where the conductor mounted the steps of a car after it had started in such a manner as to push off a passenger who was trying to get aboard, the company was held responsible for the injury: *Fleming v. St. Louis etc. Ry. Co.*, 101 Mo. App. 217, 74 S. W. 382. Overcharging the controller-box of an electric car, endangering the safety of a passenger who touches it, is prima facie negligence on the part of the company: *South Covington etc. St. Ry. Co. v. Smith*, 27 Ky. Law Rep. 811, 86 S. W. 970. But where a passenger was accidentally struck in the eye by the conductor's punch while he was hurrying through the car, this imposed no liability on the company: *Cheyne v. Van Brunt Ry. etc. Co.*, 97 App. Div. 56, 89 N. Y. Supp. 626; though the company was liable for damage to a lady's dress because of a greasy hinge in the platform gate, the company having knowledge of the gate's condition: *Driggs v.*

Interborough Rapid Transit Co., 96 N. Y. Supp. 1031. And where a passenger was injured by a dog brought into the car by another passenger and allowed to remain, the company was liable: *Westcott v. Seattle R. & T. Co.*, 41 Wash. 618, 111 Am. St. Rep. 1038, 84 Pac. 588, 4 L. R. A., N. S., 947.

VI. Management of Conveyances

a. In General.—A street railroad company can make reasonable rules and regulations regarding the management of its cars, such, for instance, as forbidding passengers from occupying dangerous positions on the cars, but, if they are permitted to occupy such positions, the company must exercise extraordinary care and diligence for their safety: *Augusta Ry. & E. Co. v. Smith*, 121 Ga. 29, 48 S. E. 681. When a car is nearing a corner and the conductor knows that it will lurch when it rounds the curve, and fails to so warn passengers who are moving in the car, the company is guilty of negligence: *Chicago City Ry. Co. v. McCaughna*, 216 Ill. 202, 74 N. E. 819. The company is also liable for injury to a passenger caused by an obstruction on the track, unless it exercises the required care in running its cars, so as to avoid the danger: *Indianapolis St. Ry. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201. A passenger being entitled to protection from unexpected danger, the fact that the motorman loses his head in case of sudden emergency does not relieve the company: *Howell v. Lansing City Ry. Co.*, 136 Mich. 432, 99 N. W. 406. But the motorman's negligence should be determined by his acts and not by the resultant effects: *Paul v. North Jersey St. Ry. Co.*, 70 N. J. L. 795, 54 Atl. 148. A street railway company is not bound to restrain the liberty of its passengers to prevent unnecessary chance of danger to them: *Bridges v. Jackson Electric etc. Co.*, 86 Miss. 584, 38 South. 788. Yet when a conductor knows that a passenger's position is not reasonably safe, it is his duty to control the running of the car with the care proportioned to the danger: *Van Horn v. St. Louis Transit Co.*, 198 Mo. 481, 95 S. W. 326. Starting the car before a passenger gets seated is not negligence on the part of the company. Hence, when a child was thrown from the arms of a woman out of an open car, by the starting of the car before she got to a seat, there was no liability: *Herbich v. North Jersey St. Ry. Co.*, 65 N. J. L. 381, 47 Atl. 427. A rule forbidding passengers to stand on the platforms is reasonable, and may be enforced by the ejection of a passenger for failure to obey: *Montgomery v. Buffalo Ry. Co.*, 24 App. Div. 454, 48 N. Y. Supp. 849. Where a passenger had gotten safely on a moving car and was thrown off and injured by sudden acceleration of speed, the company was liable, but if the passenger had not gotten safely on before the sudden starting of the car there would be no liability: *Boulfrois v. Union Traction Co.*, 210 Pa. 263, 105 Am. St. Rep. 809, 59 Atl. 1107.

b. **Overloading or Overcrowding the Cars.**—Some authorities hold that it is not negligence per se in a street railway company to permit its cars to become overcrowded, and consequently to be unable to provide all its passengers with seats: *Jacobs v. West End St. Ry. Co.*, 178 Mass. 116, 59 N. E. 639; *Burns v. Boston Elevated Ry. Co.*, 183 Mass. 96, 66 N. E. 418; *Halverson v. Seattle Electric Co.*, 35 Wash. 600, 77 Pac. 1058. But under such circumstances, the company is charged with the duty of exercising additional care and caution to protect those having to stand: *Augusta etc. Ry. Co. v. Rentz*, 55 Ga. 126; *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667; *Kuhlen v. Boston & N. S. R. Co.*, 193 Mass. 341, post, p. 516, 79 N. E. 815; *City Ry. Co. v. Lee*, 50 N. J. L. 435, 7 Am. St. Rep. 798, 14 Atl. 883; *Bruno v. Brooklyn City R. Co.*, 5 Misc. Rep. 327, 25 N. Y. Supp. 507; *McCaw v. Union Traction Co.*, 205 Pa. 271, 54 Atl. 893; and in *Verrone v. Rhode Island etc. Ry. Co.*, 27 R. I. 370, 114 Am. St. Rep. 41, 62 Atl. 512, it is held that where the company accepts a passenger who has to stand on the steps of the car, it must do all that human vigilance reasonably can do to protect him from injury. In some jurisdictions it is announced that a street railroad company is negligent if it allows its cars to be overcrowded beyond a reasonable and proper limit: *Reems v. St. Paul City Ry. Co.*, 77 Minn. 503, 80 N. W. 638, 778; *Pray v. Omaha St. Ry. Co.*, 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. 447; *Lehr v. Steinway etc. Ry. Co.*, 118 N. Y. 556, 23 N. E. 889; *Richmond R. & E. Co. v. Garthright*, 92 Va. 627, 53 Am. St. Rep. 839, 24 S. E. 267, 32 L. R. A. 220. In the matter of overloading and overcrowding street-cars, a distinction has been drawn by the courts between railroads operated on the surface and those operated above or underneath the surface. This distinction is based on the reason that companies operating subway or elevated roads have it within their power to regulate the number of persons allowed to pass through the gates to the station, and can thus prevent the overcrowding of their cars, and with reference to these companies it is held that they are negligent if they permit their cars to become overcrowded: *McGentz v. Manhattan R. Co.*, 43 N. Y. Supp. 1086; *Dawson v. New York etc. Ry. Co.*, 52 N. Y. Supp. 133; *Dittmar v. Brooklyn Heights R. Co.*, 91 App. Div. 378, 86 N. Y. Supp. 878; *Viemeister v. Brooklyn Heights R. Co.*, 95 App. Div. 110, 87 N. Y. Supp. 162; *Wagner v. Brooklyn Heights R. Co.*, 95 App. Div. 219, 88 N. Y. Supp. 791.

If there is danger to patrons of a street-car company at one of its stations, or in entering its cars, from the pushing and crowding of other passengers, which it must reasonably apprehend, its duty is to guard against this danger by providing a reasonable number of servants charged with the duty of preventing or minimizing it, and failing to do it, is guilty of actionable negligence toward a passenger suffering injury from such crowding and pushing, especially when its servant, seeing what is taking place, merely laughs thereat and does nothing to diminish or terminate the peril: *Kuhlen v. Bos-*

ton & N. S. R. Co., 193 Mass. 341, post, p. 516, 79 N. E. 815, 7 L. R. A., N. S., 729.

c. **Sudden Jerks and Jolts.**—A not infrequent source of injury to street-car passengers is the sudden jerking and lurching of the cars. It is difficult to give any fixed rule as to the liability of those companies for injuries thus occasioned, but one which has been announced in some jurisdictions and which seems to appeal to reason is, that a sudden jerking of the car, unless so violent as to establish negligence of the company under the doctrine of *res ipsa loquitur*, or unless due to some defect in the car or the track, does not impute negligence to the company. Sometimes, however, these jerks and jolts result from excessive rate of speed, and in such cases negligence may be inferred from that source. The following cases will serve to show how the courts have ruled in regard to this class of accidents. The Illinois court of appeals, in *West Chicago St. Ry. Co. v. Craig*, 57 Ill. App. 411, held that a sudden starting of the car with a jerk, before a passenger reached a seat, rendered the company liable for any resulting injury, but a directly contrary opinion is found in *Herbich v. North Jersey St. Ry. Co.*, 65 N. J. L. 381, 47 Atl. 427; and even the supreme court of Illinois has not upheld the doctrine in the *Craig* case, for in *Chicago City Ry. Co. v. Morse*, 197 Ill. 327, 64 N. E. 304, it is held that the sudden and violent stopping of the car, unless unusual, or due to some defect in the car or the track or dangerous rate of speed, is not negligence. So, also, in *Pryor v. Metropolitan St. Ry. Co.*, 85 Mo. App. 367, the rate laid down in the *Morse* case is followed, provided, however that the car was in charge of a skillful motorman. A passenger injured in being thrown from the platform by the lurching of the car while rounding a curve could not recover if the car was not running at an improper rate of speed: *Gidionsen v. Union Depot Ry. Co.*, 129 Mo. 392, 31 S. W. 800. Or if the speed was not greater than was necessary to propel the car around the curve: *Hite v. West St. Ry. Co.*, 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33. But when a jerk is of such violence as to throw a passenger from the body of the car to the street, negligence is presumed under the doctrine of *res ipsa loquitur*: *Ilges v. St. Louis Transit Co.*, 102 Mo. App. 529, 77 S. W. 93. And in *Scott v. Bergen County Traction Co.*, 64 N. J. L. 362, 48 Atl. 1118, negligence was imputed to the company when the jerk was of sufficient violence to throw a passenger from the platform of the car.

In *Gatens v. Metropolitan St. Ry. Co.*, 89 App. Div. 311, 85 N. Y. Supp. 967, a passenger who was compelled to stand on the platform because of the overcrowded condition of the car was allowed to recover for injuries caused by being thrown out by a lurch while the car was rounding a curve at full speed, although the motorman acted in violation of the rules of the company, and this was affirmed in *Gatens v. Metropolitan St. Ry. Co.*, 181 N. Y. 515, 73 N. E. 1124.

When a passenger, after signaling the car to stop, stepped onto the running-board of the car before it stopped and was injured by a sudden jerk of the car, the company was not liable: *Mallony v. New York City Ry. Co.*, 98 N. Y. Supp. 211. But the company was held liable where a passenger was thrown from the front platform of the car by a sudden jerk, because the driver had struck the spirited horses with a whip: *Eberhardt v. Metropolitan St. Ry. Co.*, 174 N. Y. 522, 66 N. E. 1107. Where a passenger is thrown off the car by a sudden stopping to prevent a collision for which the company would not be responsible, it is *damnum absque injuria*: *Cleveland City Ry. Co. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604. And where a passenger, with his hands full of bundles, stands on the lower steps of a car and is jolted off, the company is not liable: *Barry v. Union Traction Co.*, 194 Pa. 576, 45 Atl. 321.

Street railway companies whose cars are operated by cables are not held to as strict account for jerks and jolts as where the cars are operated by electricity, for the reason that the slackness of the cable often makes such jerks unavoidable: *Bartley v. Metropolitan St. Ry. Co.*, 148 Mo. 124, 49 S. W. 840.

d. Rate of Speed.—Operating a street-car in a city at a rate of speed greater than allowed by ordinance is negligence per se in the street railroad company, but where a passenger is injured while such speed is maintained, the company's liability for the injury must have been caused or contributed to by the greater speed, and this must be determined by all the facts and circumstances: *Fitch v. Mason City etc. Traction Co.*, 124 Iowa, 665, 100 N. W. 618; *Dallas Consol. Electric St. Ry. Co. v. Ison* (Tex. Civ. App.), 83 S. W. 408. But inference of negligence may be drawn from the rate of speed: *Marden v. Portsmouth etc. Ry. Co.*, 100 Me. 41, 109 Am. St. Rep. 476, 60 Atl. 530, 69 L. R. A. 300; *Smith v. Minneapolis St. Ry. Co.*, 95 Minn. 254, 104 N. W. 16. And greater care in speed should be observed when going down grades or approaching crossings: *Foulk v. Wilmington City Ry. Co.* (Del.), 60 Atl. 973.

e. Passing Other Vehicles and Other Objects—Collisions.—The duty of those in charge of a street-car to protect passengers from injuries in passing other vehicles and objects in the street depends largely upon the facts and circumstances of each particular case. Thus, it is negligence to cross a railroad crossing without first stopping and listening for trains: *Selma S. & S. Ry. Co. v. Owens*, 132 Ala. 420, 31 South. 598. Where the motorman failed to discover a closed switch, which resulted in a collision and injury to a passenger, the company was liable: *McAllister v. People's Ry. Co.*, 4 Penn. (Del.) 272, 54 Atl. 743. But the company is not responsible for an unavoidable collision whereby a passenger is injured: *Black v. Boston Elevated Ry. Co.*, 187 Mass. 172, 72 N. E. 970, 68 L. R. A. 799. When the motorman stopped the car to allow a passenger to alight as another car was approaching on a parallel track, without ringing the gong, and the passen-

ger was struck by the car on the other track and injured, the company was liable: *Hornstein v. United Railways Co.*, 97 Mo. App. 271, 70 S. W. 1105. A street railway company is not bound to anticipate that a passenger riding on the running-board of the car will swing back so as to be struck by a trolley pole, when he would have escaped injury if he had not swung back: *Canovan v. Interurban St. Ry. Co.*, 87 N. Y. Supp. 491. But where the road was being changed and barrels of gravel stood near the track, and a car was derailed by striking one of them, and a passenger thrown to the floor, the company was liable for the injury he sustained: *Ramson v. Metropolitan St. Ry. Co.*, 177 N. Y. 578, 69 N. E. 1129.

When a street-car had to pass buildings that were being demolished and the motorman was signaled by a person in the street to stop, but failed to do so, and a passenger was injured by the falling of a wall, the company was liable: *Buchler v. Union Traction Co.*, 200 Pa. 177, 49 Atl. 788. And when a motorman fails to get his car under control when he sees that the driver of a team on the track is not noticing the ringing of the bell, the company is liable to a passenger who is injured in a collision with the wagon: *Sears v. Seattle Electric Co.*, 6 Wash. 227, 33 Pac. 389.

VII. Contributory Negligence of Passengers.

a. **In General.**—That one seeking to recover for the negligence of another must himself have been free from negligence is a well-established principle of law, but while the carrier is bound to exercise extraordinary care for the safety of its passengers, the passenger is only required to exercise ordinary care for his safety: *West Chicago St. Ry. Co. v. Horne*, 100 Ill. App. 259 (affirmed in 197 Ill. 250, 64 N. E. 331); *Topp v. United Railways etc. Co.*, 99 Md. 630, 59 Atl. 52. This reasonable rule is based on the principle that the passenger has the right to assume that the carrier will perform its duty and not expose him to danger: *Citizens' Street Ry. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491. Hence, a passenger is not required to look out for unguarded holes near the entrance to a car, nor for the unheralded removal of safeguards: *Lake St. etc. Ry. Co. v. Burgess*, 99 Ill. 499. The fact that a passenger had passed a vacant seat after entering a car before he was thrown by a jerk of the car and injured did not charge him with contributory negligence: *Weeks v. Boston Elevated Ry. Co.*, 190 Mass. 563, 77 N. E. 654. And where a passenger alighting from a car let go the handhold when one foot was on the lower step and the other in the air, and was thrown and injured by starting of the car, there was no contributory negligence: *Brazis v. St. Louis Transit Co.*, 102 Mo. App. 224, 76 S. W. 708; and a similar ruling is found in *Richmond Traction Co. v. Williams*, 102 Va. 253, 46 S. E. 292.

One who enters a moving car assumes the risks, and if he sustains an injury which is due solely to the fact that the car was in

motion when he attempted to board it he cannot recover: *Pope v. Chicago City Ry. Co.*, 113 Ill. App. 503; *Murphy v. North Jersey St. Ry. Co.*, 71 N. J. L. 5, 58 Atl. 1018; *Boulfrois v. United Traction Co.*, 210 Pa. 262, 105 Am. St. Rep. 809, 59 Atl. 1007. But where one had stepped on a car when it had almost stopped and was injured by its sudden starting, he was not per se guilty of contributory negligence: *Mulligan v. Metropolitan St. Ry. Co.*, 89 App. Div. 207, 85 N. Y. Supp. 791. If, however, a passenger who boarded a moving car and was thrown from the footboard by a jerk of the car, failed to reach a place of safety because of the crowded condition of the car and not on account of the motion of the car, he would be guilty of contributory negligence: *Mullane v. New York City Ry. Co.*, 99 N. Y. Supp. 798. A passenger who sustains injury by reason of riding on the platform when there is room inside the car, is guilty of contributory negligence: *Kirchner v. Oil City St. Ry. Co.*, 210 Pa. 45, 59 Atl. 270. Where a passenger, after signaling the car to stop, left his seat and stood without support, and was thrown down and injured by the stopping of the car, he could not recover: *Bendon v. United States Traction Co.*, 26 Pa. Super. Ct. 539.

b. Passengers Occupying Dangerous Positions.—The general rule is that one who voluntarily occupies a dangerous position in a street-car assumes such risks as are liable to occur incident to it; but, as passengers are often compelled, owing to the crowded condition of the cars, to stand on the platforms, the running-boards and even at times the bumpers, the question of contributory negligence under these circumstances is not always easy to determine. It has been frequently held that it is not negligence per se for a passenger to stand on the platform of a street-car: *Highland etc. Ry. Co. v. Donovan*, 94 Ala. 299, 10 South. 139; *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173, 60 Pac. 780; *Hesse v. Meriden etc. Tramway Co.*, 75 Conn. 571, 54 Atl. 299; *Augusta etc. Ry. Co. v. Renz*, 55 Ga. 126; *Chicago etc. Traction Co. v. Lawrence*, 113 Ill. App. 269 (affirmed in 211 Ill. 373), 71 N. E. 1024; *Sutherland v. Standard L. & A. Insurance Co.*, 87 Iowa, 505, 54 N. W. 453; *Moser v. South Covington etc. Ry. Co.*, 25 Ky. Law Rep. 154, 74 S. W. 1090; *Beal v. Lowell & D. St. Ry. Co.*, 157 Mass. 444, 32 N. E. 653; *Upham v. Detroit City Ry. Co.*, 85 Mich. 12, 48 N. W. 199, 12 L. R. A. 129; *Matz v. St. Paul City Ry. Co.*, 52 Minn. 159, 53 N. W. 1071; *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407, 43 Atl. 1060; *Bumbear v. United Traction Co.*, 198 Pa. 198, 47 Atl. 961; *Muldoon v. Seattle City Ry. Co.*, 7 Wash. 528, 38 Am. St. Rep. 901, 35 Pac. 422, 22 L. R. A. 794. Nor is it per se negligence for a passenger to ride on the running-board of a crowded car: *Brainard v. Nassau Electric R. Co.*, 44 App. Div. 613, 61 N. Y. Supp. 74; *Sheeron v. Coney Island etc. Co.*, 78 App. Div. 476, 79 N. Y. Supp. 752; *Anderson v. City etc. Ry. Co.*, 42 Or. 505, 71 Pac. 659. But if there is room inside the car, a passenger who stands on the platform or the running-board assumes the risk: *Pike v.*

Boston Elevated Ry. Co., 192 Mass. 426, 78 N. E. 497; Willmot v. Carrigan Consol. St. Ry. Co., 106 Mo. 535, 17 S. W. 490; Barlow v. Jersey City etc. Ry. Co., 67 N. J. L. 364, 51 Atl. 463; Vogler v. Central Crosstown R. Co., 83 App. Div. 101, 82 N. Y. Supp. 485; Moskowitz v. Brooklyn Heights R. Co., 89 App. Div. 425, 85 N. Y. Supp. 960; Kiefer v. Brooklyn Heights R. Co., 111 App. Div. 404, 97 N. Y. Supp. 841; Woodroffe v. Roxborough etc. Ry. Co., 201 Pa. 521, 88 Am. St. Rep. 827, 51 Atl. 324; Kirchner v. Oil City St. Ry. Co., 210 Pa. 45, 59 Atl. 270; Rice v. Philadelphia Rapid Transit Co., 214 Pa. 147, 112 Am. St. Rep. 738, 63 Atl. 419; McDade v. Philadelphia R. T. Co., 215 Pa. 105, 64 Atl. 327. So, also, if a passenger leaves his seat before the car stops and goes to the edge of the platform and is thrown off and injured by the sudden stopping of the car, he is guilty of contributory negligence: Jennings v. Union Traction Co., 206 Pa. 31, 55 Atl. 765; but if he does so upon request of the conductor, the company is liable: Druzepski v. People's St. Ry. Co., 30 Pa. Super. Ct. 380.

A passenger standing on the platform is required to exercise the increased care which the increased danger entails: Parks v. St. Louis etc. Ry. Co., 178 Mo. 108, 101 Am. St. Rep. 425, 77 S. W. 70; hence if he is struck by the handle of a brake which he could have avoided, the company is not liable: Brewer v. St. Louis Transit Co., 105 Mo. App. 503, 79 S. W. 1021; and if, while riding on the running-board, he is struck by a wagon-shaft which other passengers had avoided, he could not recover: Rosen v. Dry Dock etc. Ry. Co., 91 N. Y. Supp. 333. And to the same effect is Depew v. New York City Ry. Co., 112 App. Div. 260, 98 N. Y. Supp. 276. But if a passenger on the running-board is struck by a wagon near the track before he has time to get inside the car, he is not guilty of contributory negligence: Walsh v. Interurban S. Ry. Co., 98 N. Y. Supp. 656.

The fact that a passenger occupies a dangerous position does not alter his character as a passenger or the degree of care which the company must exercise toward him: Birmingham etc. Ry. Co. v. Bynum, 139 Ala. 389, 36 South. 736. And if the company assumes to carry a passenger on the steps of the car, it must carry him safely in that position, if it can be done by that high degree of care which the law requires of carriers toward their passengers: Parks v. St. Louis etc. Ry. Co., 178 Mo. 108, 101 Am. St. Rep. 425, 77 S. W. 70; and to same effect is Bumbear v. United Traction Co., 198 Pa. 198, 47 Atl. 961. If a passenger is allowed to ride on the bumper and his fare is collected, the company is liable for an injury to him caused by a car in the rear colliding with the car on which he is riding: Grieve v. North Jersey St. Ry. Co., 65 N. J. L. 409, 47 Atl. 427; but if he is warned of the danger by the conductor, and fails to heed the warning, he is guilty of contributory negligence: Nieboer v. Detroit Electric Ry. Co., 128 Mich. 486, 87 N. W. 626.

Where a passenger standing on the step of a crowded car fell off because he loosed his hold to pay his fare, he was guilty of contribu-

tory negligence: *South Covington etc. Ry. Co. v. Physioc*, 29 Ky. Law Rep 14, 92 S. W. 305.

VIII. Ejection of Passengers.

The right of those in charge of a street-car to expel obnoxious passengers is too well recognized to require further notice, but many instances occur over a dispute between the conductor and a passenger as to the validity of a transfer, the passenger being in no way disorderly or obnoxious to other passengers. We have already seen, while discussing another branch of this topic, the conflict of opinion among the courts regarding the rights to transportation of those holding defective transfers, where the mistake was made by the servants of the company. The same conflict, of course, exists with reference to the company's right to expel a passenger under like circumstances, for no orderly passenger who was entitled to be transported could lawfully be ejected. As the right to eject a passenger holding a transfer depends upon the question whether he is or is not a passenger, without the payment of additional fare, it will be well to refer to the cases heretofore cited in this note under the heading "Transfers to Connecting Lines," as being applicable to the point now under consideration. In *Little Rock Traction & E. Co. v. Winn*, 75 Ark. 529, 87 S. W. 1025, and *Norton v. Consolidated Ry. Co.*, 79 Conn. 109, ante, p. 132, 63 Atl. 1087, it was held that the conductor was justified in ejecting a passenger for refusing to pay fare when the time on his transfer had been erroneously punched, provided the conductor acted under the rules of the company and had been guilty of no unnecessary rudeness. But, as we have heretofore seen, there are many jurisdictions holding that a passenger is not bound to examine a transfer to see if he is given the correct one, and that the relation of carrier and passenger continues until the point of destination on the connecting line is reached; and under these circumstances, of course, an expulsion would not be authorized.

IX. Proximate Cause of Injury.

The well-established rule in regard to injuries to the person that the wrong complained of must be the proximate cause of the injury applies with equal force to injuries received by passengers of street railroads, as the following instances will show:

A passenger was thrown from a street-car and killed by the premature starting of the car. He had heart disease and would have died at some indefinite time in the future. The fall from the car was held to be the proximate cause of his death: *Guenther v. Metropolitan St. Ry. Co.*, 23 App. D. C. 493. And where a street-car passenger was injured at a railroad crossing in a collision between the street-car and the train, the negligence of the street-car conductor in signaling his car to start when he knew the train was approaching was the proximate cause of the injury, and the street railroad company was liable:

Chicago City Ry. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139. The sudden starting of the car was the proximate cause of an injury to a passenger who was thrown on the track of another street-car, and was struck by it: Scamell v. St. Louis Transit Co., 102 Mo. App. 198, 76 S. W. 660. And when a passenger was thrown from a car between the feet of a mule hitched to a heavily loaded wagon, and was injured by the wagon being drawn over him, the proximate cause of the injury was being thrown from the car: Parker v. St. Louis Transit Co., 108 Mo. App. 465, 83 S. W. 1016. But negligently carrying a passenger beyond her destination was not the proximate cause of an injury she received from a fall while she was walking back to her original point of destination: Haley v. St. Louis Transit Co., 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295. And the failure of the conductor to stop the car when signaled was not the proximate cause of an injury to a passenger who was struck by a passing team because he leaned back trying to signal the conductor again to stop: Flynn v. Consol. Traction Co., 67 N. J. L. 546, 52 Atl. 369, and to same effect is Cleve v. Morgan etc. R. Co., 107 La. 370, 90 Am. St. Rep. 319, 31 South. 886.

Where a passenger's injury was caused by the collision of the car with a truck, because of the company's failure to restore a street in which its tracks were laid to its former good condition, the company was liable Freeland v. Brooklyn Heights R. Co., 43 Misc. Rep. 132, 8 N. Y. Supp. 264. But a fire in the car which caused the conductor to stop at a point in the street, where a passenger was injured by stepping into an unguarded excavation, was not the proximate cause of the injury: Goldberg v. Interurban St. Ry. Co., 90 N. Y. Supp. 347. The fact that a passenger was permitted to smoke in a car, contrary to the rules of the company, was not the proximate cause of an injury to a passenger from a panic in the car, caused by the smoker throwing a lighted match and igniting a lady's dress: Fanizzi v. New York etc. R. Co., 113 App. Div. 440, 99 N. Y. Supp. 281.

FARRIGAN v. PEVEAR.

[193 Mass. 147, 78 N. E. 855.]

PUBLIC CHARITIES, What are.—A gift for the sole purpose of affording education and maintenance for destitute boys, without compensation, creates a valid public charity. (p. 484.)

PUBLIC CHARITIES, if Incorporated, are exempt from actions founded on the negligence of attendants or servants. (p. 485.)

PUBLIC CHARITIES, Nonliability of Trustees of Unincorporated.—The trustees of an unincorporated public charity are not liable for injuries due to the negligence of attendants or servants in whose selection reasonable care was used. (p. 486.)

Tort for personal injuries sustained by the plaintiff when in the employ of the defendant, and alleged to be due to the putting him to work in an unsafe and dangerous place. It was claimed that the defendants knew, or in the exercise of reasonable care might have known, that the place was unsafe and dangerous. It appeared by the answer that the defendants were trustees of a public charitable institution, and as individuals had no interest in the premises where the plaintiff was injured. It was admitted by the plaintiff that there was no personal negligence by the defendants, or of any of them, and that if there was any negligence, it was that of the servants and agents of the defendants acting as such trustees. The judge ordered a verdict for the defendants, and the plaintiff alleged exceptions.

G. S. Taft, for the plaintiff.

G. A. Gaskill, for the defendants.

¹⁴⁸ **BRALEY, J.** The Stetson Home, of which the defendants are trustees, was founded and is maintained under a trust created by gift for the sole purpose of affording an education and maintenance for destitute boys, and whatever advantages the institution offers are conferred without compensation. These distinctive features are ample to bring the home, even if unincorporated, within that class of benevolent institutions whose sole purpose is to furnish relief to destitute and deserving people, and therefore constitutes a valid public charity: *Bartlett v. Nye*, 4 Met. ¹⁴⁹ 378; *Odell v. Odell*, 10 Allen, 1; *Jackson v. Phillips*, 14 Allen, 539; *Sherman v. Congregational Home Missionary Society*, 176 Mass. 349, 57 N. E. 702; *Minot v. Attorney General*, 189 Mass. 176, 75 N. E. 149.

At the outset it may be said that the case of *Davis v. Central Congregational Soc.*, 129 Mass. 367, 37 Am. Rep. 368, on which the plaintiff relies, and that of *Smethurst v. Barton Square Church*, 148 Mass. 261, 12 Am. St. Rep. 550, 19 N. E. 387, 2 L. R. A. 695, are not authorities in his favor, as in those cases the question of the liability of a public charity for the negligence of its servants or agents does not appear to have been raised or decided: See *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420, 66 N. E. 593, 5 L. R. A., N. S., 686; *Osgood v. Rodgers*, 186 Mass. 238, 71 N. E. 306. Compare *Chapin v. Holyoke Young Men's Christian Assn.*, 165 Mass. 280, 42 N. E. 1130, and *Donnelly v. Boston Catholic Cemetery Assn.*, 146 Mass. 163, 15 N. E. 505.

Under the authority of *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, if the home had been incorporated the plaintiff could not have maintained this action against it, for such a corporation was held in that case not to be liable for the negligence of its servants properly selected when acting in the performance of their prescribed duties: See, also, *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836. Among the reasons given for this exemption it has been said, that being a charitable institution rendering services to the public without pecuniary profit, if the property of the charity was depleted by the payment of damages, its usefulness might be either impaired or wholly destroyed, the object of the founders or donors defeated, and charitable gifts discouraged; or that if an individual accepts the benefit of a public charity, he thereby enters into a relation which exempts his benefactor from liability for the negligence of servants who are employed in its administration, provided due care has been used in their selection: *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 44 Am. St. Rep. 243, 24 S. W. 1065, 23 L. R. A. 200; *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 6 Am. St. Rep. 745, 15 Atl. 553, 1 L. R. A. 417; *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372. But whatever grounds may have been stated in support of these and other decisions which have held public charities exempt from actions caused by the negligence of attendants or servants, such an exemption may well rest upon ¹⁵⁰ the application of the rule of law which makes the

principal accountable for the acts of his servant or agent. Accordingly, the true inquiry is whether this rule applies to the defendants. They are not shown to have selected incompetent servants, and are conceded not only to have been ignorant of the conditions which caused the alleged injury, but to have given to the plaintiff no instructions; nor can there be imputed to them knowledge in fact of any order given by their agents to him.

By the case of *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214, following the decision in the leading case of *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, it was decided that there was no distinction as to liability for the negligence of servants, whether they were employed by a corporation established for a public purpose, or by a private person or corporation. This doctrine was approved and followed in the cases of *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, and of *Donaldson v. General Public Hospital*, 30 N. B. 279, where a public charity was held liable in tort for damages suffered by patients from the negligence of servants, though subsequently, by the Public Laws of Rhode Island (1880), chapter 802, such institutions in that state are now exempt from this measure of liability. The plaintiff's argument in effect asks us to follow the last two cases, which have been decided since our former decision in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. St. Rep. 529. But in this commonwealth the rule of liability enunciated by the principal case has not been so broadly applied, and neither cities and towns in the performance of authorized municipal acts independently of certain exceptions defined by our decisions, nor public officers, although liable in damages for personal acts of negligence which cause injury to the persons or property of others when discharging the duties of their office, are held liable for the misfeasance of their servants: *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *Rome v. Worcester*, 188 Mass. 307, 74 N. E. 370; *Dickinson v. Boston*, 188 Mass. 595, 75 N. E. 68, 1 L. R. A., N. S., 664, and cases cited; *Moynihan v. Todd*, 188 Mass. 301, 108 Am. St. Rep. 473, 74 N. E. 367, and cases cited; *Haley v. Boston*, 191 Mass. 291, 77 N. E. 88, 5 L. R. A., N. S., 1005. See, also, 2 Dillon on Municipal Corporations, 4th ed., sec. 974. The reason for this rule is, that acting for the benefit of the public solely in representing a public interest,

whether by a municipality or by a public officer, ¹⁵¹ does not involve such a private pecuniary interest as lies at the foundation of the doctrine of respondeat superior. While such officers may well be held liable for their personal negligence, it would be unreasonable and harsh to hold them responsible for the negligence of their servants or agents.

There would seem to be in principle no sound distinction between an action for negligence by which personal injuries have been received, directly instituted against the charity by the person injured, where its corporate form renders such procedure possible or expedient, and the present case. The object of the charity is the same whether administered by trustees elected by a corporation, or selected or appointed under a deed of gift; and even if the terms of the settlement are not referred to in the exceptions, the trust is stated to be perpetual, and if so, its provisions can be enforced in equity. Under either form of administration, those who administer the trust act essentially in a representative and not in a private capacity, and such trustees are not within the rule which holds the master liable, because, as we have said, where that rule applies the servant is acting, not only under his orders, but also for his benefit, and in the furtherance of the master's business: *Farwell v. Boston etc. R. R.*, 4 Met. 49, 38 Am. Dec. 339.

In no correct or just sense can it be said that the defendants were conducting a business, or engaged in an enterprise, from which they received or could expect to derive any monetary advantage or private emolument. They were serving without compensation in the supervision of a home for indigent boys, which was established for the purpose of enabling them to become self-supporting and efficient members of society. Their duty to the plaintiff in the exercise of this function did not extend beyond the requirement of using reasonable care to select competent servants, and the demands of substantial justice are met if as charitable trustees they are not charged with the negligence of those so employed: *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529.

We are not unmindful that the remedy which the plaintiff may have against a fellow-servant for the negligence, if any, which caused the accident may be wholly theoretical and of little practical value, yet we deem it to be in accord, not only ¹⁵² with our own decisions, but with the weight of authority, to decide that the present action cannot be maintained, and

that the ruling directing a verdict for the defendants was right: *Heriot's Hospital v. Ross*, 12 Clark & F. 507; *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 44 Am. St. Rep. 243, 24 S. W. 1065, 23 L. R. A. 200; *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 6 Am. St. Rep. 745, 15 Atl. 553, 1 L. R. A. 417; *Van Tassell v. Manhattan Eye & Ear Hospital*, 15 N. Y. Supp. 620; *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37; *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427, 60 N. W. 42, 25 L. R. A. 602; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Eighmy v. Union Pacific Ry.*, 93 Iowa, 538, 61 N. W. 1056, 27 L. R. A. 296; *Union Pacific Ry. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581.

Exceptions overruled.

Public Charities have been held exempt from liability for the negligence of employes: *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 6 Am. St. Rep. 745; *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 44 Am. St. Rep. 243. But see *Trevett v. Prison Assn.*, 98 Va. 332, 81 Am. St. Rep. 727.

MASON v. WHITNEY.

[193 Mass. 152, 78 N. E. 881.]

WATERS, Riparian Rights from Custom or Usage not Amounting to Prescription.—In the maintenance of prescriptive rights there is no right, as between riparian proprietors, in the waters of a stream, founded upon custom or usage. (p. 492.)

WATERS, Riparian Proprietors' Rights in.—In determining what is reasonable for each of the parties, the nature of the stream and of the several mill privileges, its adaptability to different modes of use, the wants of the community, the custom or usage of the people in the neighborhood and elsewhere in regard to the management of the business, the hours of labor, and the use of the water of such stream, are all proper matters for consideration as evidence. (p. 492.)

WATERS, Reservoirs and Dams, Proprietors not Owning Have No Right to the Benefit of.—If the plaintiffs have enjoyed for their wheels gratuitously the benefit of the defendant's dam and reservoir for the storage of water and for their wheels, that is not a circumstance which gives them a right to have it in like manner in the future, or which deprives him of the right to use the stream now as he could do if his works on the stream were all new. Nor does it

make it less reasonable for him to use the water now according to his interest. (p. 493.)

WATERS.—The Joint Use of the Waters of a Stream by Several Riparian Proprietors does not enlarge their rights, in a suit brought by them against a lower riparian proprietor. The question as to each is, whether the defendant is using the water unreasonably to his detriment. (p. 493.)

WATERS, Rights of Riparian Proprietors.—The primary right of every riparian proprietor is to have the natural and customary flow of the stream without obstruction or change. This right is modified by the right of every proprietor to make any reasonable use of the water which leaves the lower proprietor the natural flow, changed, so far as may be, by such previous use of the stream above. If such use makes the flow more advantageous for the lower proprietor than the flow in its strictly natural state, he gets the benefit of it, as an incident to his ownership, which he may enjoy while it lasts, but not as permanent property which he can control for the future. (p. 494.)

WATERS—Night-time, Riparian Owners' Right to Use in.—It is not unreasonable for a mill owner, if his interests require it, to use the waters of a stream at night as well as by day, so long as he leaves the natural flow of the stream unobstructed and undiminished during the ordinary working hours of the day. (p. 495.)

WATERS.—A Riparian Owner Maintaining a Reservoir cannot be Compelled to Allow More Water to Run During the Working Hours than if no reservoir were maintained. If an upper proprietor maintains for his own purpose a reservoir for the storage of water that fails in the wet season, to be let down into the stream in times of low water, and in such time increases the flow by letting down water, the additional quantity that so comes each day may be treated as part of the natural flow for the twenty-four hours in determining the rights of the lower mill owners in reference to the use of their mills farther down the stream, but the mill owner is not under any obligation, against his own interest, to hold back water in the night-time in order to enable his neighbor to use it more profitably the next day. The lower proprietor is entitled only to a natural flow, and not to an intermittent flow. (p. 495.)

Suit in equity by the proprietors of mills and mill privileges on a watercourse called Millers river against another proprietor of mills and mill privileges on the same stream, to restrain him from preventing the permanent flow of the waters of that stream and the reservoirs thereof from passing to the several mill privileges or mills of the plaintiffs in the natural and customary manner during the working hours of the day-time of each day. The complainants obtained a decree in the trial court, and the defendant appealed.

T. H. Gage, Jr., and F. F. Dresser, for the defendant.

H. Parker and G. A. Gaskill, for the plaintiffs.

¹⁵³ KNOWLTON, C. J. On Millers river, in the town of Winchendon, within a distance of less than two miles are six

mill privileges, each occupied for manufacturing purposes. Altogether they have a head and fall for the use of water-power on their several wheels, which amounts to ninety-eight and one-half feet. The defendant owns the upper privilege, each of the parties plaintiff owns one of the others, and one is owned by persons who are not connected with this suit. The defendant's mills ¹⁵⁴ are near the head of the valley. They have a fall of twenty feet, with a mill pond covering one hundred and ten acres, containing five million cubic feet of water for one foot in depth of the pond, this being something more than the entire flow of the stream for twenty-four hours. The mills have been used since 1846, in part for a machine-shop and in part as a cotton factory, and lately as a machine-shop and power-house to furnish electricity to light the town of Winchendon. The mills of the several plaintiffs have been used still longer for different kinds of manufacturing. The valley is narrow, and descends rapidly from the defendant's mills to the westward. "The plaintiffs' mills have no substantial storage capacity in the respective mill ponds. It is only sufficient for from two to four hours' use when there is no inflow." The defendant maintains and uses, in connection with his mill, a large reservoir some miles up the stream on one of its branches, and the mill owner next above him maintains and uses two other reservoirs above his pond on the other branch of the stream. The master finds and the plaintiffs concede, what is clear upon the evidence, that no one of the parties has acquired any rights by prescription. The defendant's use of the water at his mills has always been such as he has found most convenient for his own purposes, and there is no foundation for a claim of use adverse to him.

For a long time previous to June, 1899, the usual hours for operating all of these establishments were from 7 A. M. to 6 P. M., with an hour's interval at noon. At an earlier period, the mills ran eleven hours, and in all the years, from time to time when business was pressing, they were operated overtime during a part of the hours of the night. Since June, 1899, the defendant has used one of his two wheels ten hours per day for his machine-shop, and the other, for a considerable part of each night, in producing electricity for lighting the town of Winchendon. From lack of storage capacity in their ponds, much of the water used for this latter purpose has not been utilized by the plaintiffs, and they have not been able to have the entire flow of the stream for twenty-four hours come

to their wheels during the ten hours which constitute their ordinary working day. This bill is brought to recover for their loss, and to obtain an injunction against a continuance by the defendant of this use.

¹⁵⁵ The plaintiffs proceed upon the theory that, because of the custom and usage of mill owners on this stream, even though no prescriptive rights have been acquired, they are legally entitled to have the water come down from defendant's mills in such a way that, without mill ponds of their own sufficient to retain any considerable amount of water, they can use the whole flow of the stream for a day of twenty-four hours during the ten hours of the day in which they find it convenient to operate their machinery. The master has adopted this theory. The defendant made many requests for rulings in matters of law, touching this subject, which were refused or modified by the master. The defendant's requests for a ruling that the natural flow of the stream may be used "in any reasonable manner required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size of the stream," the master gave with the qualification that, "in the case of ancient mills, dependent on a flow which has been established by custom and use and the wants of the community, the upper proprietor must exercise his right to the use of the water with a just regard to the like reasonable use of it by the proprietors of mills immediately below, as those rights have been established by custom and usage and the wants of the community." The fifth request was that, "so long as an upper proprietor uses the water in a reasonable and lawful manner and in a way best fitted to his needs and necessities, he does not by such mere user lose any rights by prescription, and can, if a change in user becomes advantageous to him, alter and modify his user so long as he does not impair thereby the natural flow of the stream." This the master modified by inserting after the word "necessities" the words "and in the absence of any acquired right in the lower proprietors arising out of long-established custom and usage and the wants of the community," and by adding, at the end, the words, "unless the flow has been established by long custom and usage." The thirteenth request was as follows: "If the plaintiffs have any rights in the defendant's user other than the rights common to all riparian proprietors they must show that such rights have been gained by prescription." To this the master added the words, "or by custom

and usage extending over more than twenty years. The nature of ¹⁵⁶ the custom and usage established in this case appears in the body of the report." In reference to the eighteenth request the master says: "I have based my findings on a custom and usage adopted and carried out for many years by both the plaintiffs and the defendant." In dealing with other requests and in other parts of his report, the master refers to an established custom and the usage of the plaintiffs and the defendant, in their use of this stream, which has changed the rights common to riparian proprietors upon similar streams, and limited the rights which the defendant would otherwise have to a use of the water for power. This, too, when it is found and conceded that no rights have been acquired or lost by prescription. The application of the law by the master is such that the plaintiffs are now held entitled, as against the defendant, to have his mill and pond and reservoir so managed that the entire flow of the water for the twenty-four hours shall come to their mills during the ten hours of the day when they wish to run their wheels; while if it were not for the dams and reservoirs of the defendant and another proprietor farther up the stream, the water would flow regularly night and day, so that, during the fourteen hours of each day when their mills are not running, the plaintiffs would lose much of the flow from lack of storage capacity in their ponds. The result would be that, without having acquired any prescriptive rights, the plaintiffs could compel these upper proprietors to interrupt the natural flow of the stream every day, and retain the water until the time when the plaintiffs wished to use it.

This is a mistaken view of the law. In the absence of any prescriptive rights, the plaintiffs have no greater right against the defendant, in reference to his use of the stream, than they would have if his mills and dams and reservoir and their mills and dams had been built and used but a single month. In the latter case each would have a right to a reasonable use of the water. In determining what is reasonable for each of the parties, the nature of the stream and of the several mill privileges, its adaptability to different modes of use, the wants of the community, the custom and usage of people in the neighborhood and elsewhere in regard to the management of business, the hours of labor, and the use of the water of such streams, would all be proper matters for consideration as evidence: *Tourtellot* ¹⁵⁷ v. *Phelps*, 4 Gray, 370; *Gould* v. *Boston Duck*

Co., 13 Gray, 442; Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 24 N. E. 774, 7 L. R. A. 613; Hazard Powder Co. v. Somersville Mfg. Co., 78 Conn. 171, 112 Am. St. Rep. 144, 61 Atl. 579. In the absence of rights by prescription, the only difference in the determination of such a question between a case when the mills are all new and a case when the mills have all been running sixty years is that, in dealing with old mills, the evidence of custom and usage as to hours of labor or the methods of doing business, which in either case would include the practice of the whole community in such matters, would be enlarged by taking in, with the rest, the practice of the half dozen owners on this stream. So far as it concerns the issue in this case, there is nothing to indicate that, for the last fifty years, there has been anything different in the experience of these men from that of men and property owners generally, engaged in like pursuits. So, upon custom and usage, the material evidence would doubtless be substantially the same if the mills were new as it is now. If the plaintiffs have enjoyed gratuitously the benefit of the defendant's dam and reservoir for the storage of water for their wheels, that is not a circumstance which gives them a right to have it in like manner in the future, or which deprives him of the right to use the stream now as he could use it if his works on the stream were all new. Nor does it make it less reasonable for him to use the water now according to his interest.

So, too, the rights of these plaintiffs are not enlarged by their suing jointly. The question as to each is whether the defendant is using the water unreasonably to his detriment. If the defendant were not using it at all—if he and one or two proprietors farther up should abandon their mills and take away their dams and open their reservoirs, so that the water would come down to the plaintiff's mills in its natural flow, in the same quantity in all parts of each day of twenty-four hours—it seems very plain that the plaintiffs would have no legal ground of complaint, although they would be able to use on their wheels, during each working day of ten hours, very much less water than they use now.

The question of chief difficulty in the case is: How far is it reasonable for a mill owner on such a stream to use the water in the night-time, for a legitimate business which calls for power ¹⁵⁸ during that part of the day, although in most kinds of business power is used not more than ten hours a day? It is a familiar fact that certain industries cannot be con-

ducted profitably without the use of power in the night-time, This is true of paper manufacturing, which is an important industry in Massachusetts, of producing electricity for lighting and for the use of street railways, of powder manufacturing and of some other kinds of business. All kinds of legitimate business are alike entitled to the protection of the law. This is recognized in the cases which show a use of water-power in the night-time, to the detriment of proprietors who wish to use it only in the daytime: *Barrett v. Parsons*, 10 Cush. 367; *Bullard v. Saratoga Victory Mfg. Co.*, 77 N. Y. 525; *Keeney & Wood Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576; *Hazard Powder Co. v. Somersville Mfg. Co.*, 78 Conn. 171, 112 Am. St. Rep. 144, 61 Atl. 519.

The primary right of every riparian proprietor is to have the natural and customary flow of the stream, without obstruction or change. This primary right is modified by the right of every proprietor to make a reasonable use of the water, which leaves the lower proprietor the natural flow, changed, so far as it may be, by such previous use on the stream above. If such use makes the flow more advantageous for the lower proprietor than the flow in its strictly natural state, he gets the benefit of it, as an incident of his ownership, which he may enjoy while it lasts, but not as permanent property that he can control for the future. The fact that a reasonable use by an upper proprietor leaves the flow more beneficial than the strictly natural flow to those on the stream below may well be considered as a circumstance, so long as the condition remains, in determining what is a reasonable use for an intermediate proprietor, in reference to those farther down. In this way a reservoir, reasonably constructed and used in connection with a stream, may so far affect the stream below as properly to be taken into account in passing upon the conduct of lower riparian proprietors.

We have been referred to no adjudication, and after searching we have found none, that determines how far a proprietor, under a claim of a reasonable use, may change the natural flow of a stream by appropriating its waters in the night-time and holding them back in the daytime. In *Barrett v. Parsons*, 10 Cush. ¹⁵⁹ 367, the judge left to the jury the question whether the defendant had "used the water in a reasonable and proper manner, for the regular prosecution of his business," or "had used it unreasonably, wantonly and unnecessarily, by running his mill at unusual and unreason-

able hours, and holding back the water, and letting it down to the plaintiffs' works at improper times of the day and night, so that the plaintiffs were thereby deprived of the reasonable, ordinary, and proper use of their mills." The defendant had used his gristmill a great deal in the night-time, and had let down to the plaintiffs but little water in the daytime. A detention of water in the night-time and an increased use of it in the daytime have often been held to be reasonable, even when they affected unfavorably a particular proprietor below. This is because such use is in accordance with the usual and convenient method of transacting most kinds of manufacturing business. But reversing the method would be detrimental to the interests of most lower riparian proprietors. In all the five cases last above cited, the decision was adverse to the contention of mill owners that they could lawfully change the natural flow of a stream by using the water at night and holding it back in the daytime, to the damage of owners below. But we are of opinion that it is not unreasonable for a mill owner, if his interest requires it, to use the water of his stream in his business at night as well as by day, so long as he leaves the natural flow of the stream unobstructed and undiminished during the ordinary working hours of the day. If an upper proprietor maintains, for his own purposes, a reservoir for the storage of water that falls in the wet season, to be let down into the stream in times of low water, and in such times increases the flow by letting down water, the additional quantity that so comes each day may be treated as a part of the natural flow for the twenty-four hours, in determining the rights of a lower mill owner in reference to the use of other mill owners farther down the stream. But the mill owner ought not to be under an obligation, against his own interest, to hold back water in the night-time in order to enable his neighbor below to use it more profitably the next day. The lower proprietor is "entitled only to the natural flow, not to an intermittent flow": *Weare v. Chase*, 93 Me. 264, 44 Atl. 900. We think this too plain for doubt where the stream comes ¹⁰⁰ to the upper proprietor with its strictly natural flow unchanged by any use above. If there is a use above which usually sends down to him most of the water in the daytime, the subject takes on difficulties. Does reasonable conduct require him to forego his own interest, in order to give the proprietor below something better than the natural flow of the stream, because it comes to him

changed in a way that would be beneficial to the lower proprietor? The general statement of the law in the decisions indicates that, in the absence of special rights acquired by grant or prescription, a riparian proprietor is entitled to nothing more or better than the natural flow of the stream. If he wishes to use all the water during a part of the day, he may provide for himself storage, or otherwise adapt his works to the conditions. We are of opinion that it is not unreasonable for a mill owner, even if the water above him is all used in the daytime, to use a part of it in his business in the night-time, provided he leaves as much as the regular, natural flow of the stream, unaffected by use, to pass by at all times during the ordinary business hours of the day. We do not say, as a matter of law, that there may not be conditions which would make it reasonable to increase or diminish such a use in the night-time. But under the conditions that appear in this case, we think this a correct statement of what is reasonable between the parties.

Inasmuch as the use of the defendant's reservoir on the stream above is a part of his use of the stream at his mills for his own convenience, we think his entire use at the mills and at the reservoir should be considered together, in its effect upon the natural flow to the plaintiffs below, in determining the limits of the defendant's rights. That part of his use which is detrimental and that part which is beneficial to the plaintiffs, when taken together, will show how far he can go in the use of the water without invading their rights: *Elliot v. Fitchburg R. R.*, 10 Cush. 191, 57 Am. Dec. 85.

It is unnecessary to consider in detail the numerous exceptions that were taken. The principles above stated will enable the parties to determine their rights.

Decree reversed; case to stand for further hearing.

A Riparian Owner has the Right, as against a lower proprietor, to use the water for power; and this involves the right to detain it long enough and to discharge it in such a manner as will make it useful. Such detention and discharge, however, must be reasonable under all the circumstances of the particular case: *Hazard Powder Co. v. Somerville Mfg. Co.*, 78 Conn. 171, 112 Am. St. Rep. 144, and cases cited in the cross-reference note thereto. As to the right of a riparian proprietor generally to maintain a dam for a useful purpose, see the note to *Mizell v. McGowan*, 85 Am. St. Rep. 711; *Allen v. Thornapple Elec. Co.*, 144 Mich. 370, 115 Am. St. Rep. 453; *Rankin v. Harrisonburg*, 104 Va. 524, 113 Am. St. Rep. 1050.

What Constitutes a Reasonable Use of the Water of a stream by a riparian owner is a question of fact. In determining it the usage,

habit, or conduct of others under similar circumstances may properly be considered: Hazard Powder Co. v. Somerville Mfg. Co., 78 Conn. 171, 112 Am. St. Rep. 144, and cases cited in the cross-reference note thereto.

'ALLEN v. BOARDMAN.

[193 Mass. 284, 79 N. E. 260.]

WILLS—Devise to Heirs at Law, When Deemed to be per Stirpes.—Under a devise of the testator's property to his heirs at law to share the same equally, if he leaves a sister and the children of a deceased sister, his estate must be distributed per stirpes, viz., one-half to the sister and the other half equally among the children of the deceased sister. (p. 498.)

Suit in equity by the administrator for instructions as to the distribution of the residue of the estate of Charles H. Gould, deceased. He left a will in which, after making various bequests and devises, he devised and bequeathed all the residue of his property to the persons who, at his death, should be his heirs at law, "such heirs at law to share the same equally." He had in his lifetime two sisters, and at his death left as his heirs at law one of such sisters and the children of the other sister, whose death had preceded his. The judge of probate entered a decree distributing the residue, one-fourth to each of the four heirs, and the surviving sister appealed.

J. M. Raymond and H. E. Jackson, for Caroline E. Boardman.

J. Smith, Jr., for Mary E. Long, Caroline E. Denny and Alanson L. Daniels.

²⁸⁶ RUGG, J. The testator, Charles H. Gould, after disposing in numerous bequests of a large part of his property, devised the residue in the following language: "All the rest, residue and remainder of my property, real, personal or mixed, to the persons who at my decease are my heirs at law, such heirs at law to share the same equally." The testator had in his lifetime two sisters, and at his decease left as his heirs at law an only surviving sister, Caroline E. Boardman, two nieces, Mary E. Long and Caroline E. Denny, daughters of his deceased sister, and Alanson L. Daniels, a grandnephew,

son of a deceased daughter of his deceased sister. The single question presented by the reservation is whether the remaining estate is to be distributed between these heirs at law per capita or per stirpes. No assistance as to the interpretation of the disputed clause can be derived from the other provisions of the will.

It is a well-recognized rule of testamentary construction that a devise to heirs "designates not only the persons who are to take, but also the manner and proportions in which they are to take": *Daggett v. Slack*, 8 Met. 450. This rule must prevail here, unless the words of the testator, "such heirs at law to share the same equally," indicate that a different disposition was intended. Words of this general description in wills have frequently been interpreted. In *Holbrook v. Harrington*, 16 Gray, 102, the language of the testator was "to be equally divided between the heirs of my late husband and the heirs of my brothers and sisters"; in *Houghton v. Kendall*, 7 Allen, 72, ²⁸⁷ "to pay over to the children who may be surviving heirs of said Susan's body, to be divided in equal shares among them"; in *Balcom v. Haynes*, 14 Allen, 204, the devise was, "to my brothers, A, B, and C, and my sisters, D and E, and the heirs of F, to be divided in equal shares between them"; in *Bassett v. Granger*, 100 Mass. 348, the language was, "to the heirs of my late husband and to my heirs equally"; in *Rand v. Sanger*, 115 Mass. 124, "I give, devise and bequeath to be equally divided among those persons who shall be my legal heirs at the time of my decease"; in *King v. Savage*, 121 Mass. 303, the devise was for the benefit of four children of a sister of the testator during their lives, "and upon the decease of either of them, the principal of his or her share shall be equally divided among the heirs at law of such deceased person"; in *Hall v. Hall*, 140 Mass. 267, 2 N. E. 700, the property was "to be equally divided among all such issue or children, share and share alike"; in *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401, the testator provided for a division "equally between my blood relations of the degree which the law permits"; in *Townsend v. Townsend*, 156 Mass. 454, 31 N. E. 632, the testator directed a distribution equally between the families of himself and his first wife and himself and his second wife; in *Siders v. Siders*, 169 Mass. 523, 48 N. E. 277, the testamentary phrase was "in equal shares by right of representation" to certain named nephews and nieces; and in *Coates v.*

Burton, 191 Mass. 180, 77 N. E. 311, the bequest was "to her lawful issue share and share alike." In all these cases, although not in all the substantive ground of decision, the words of the testator were said to indicate the intention to make a stirpital distribution.

It is impossible to draw any line of distinction in principle between the language used in the case at bar and that passed upon in the adjudications we have referred to. It may well be that the testator phrased his residuary clause in view of some of these decided cases, and intended thereby that his property should be divided with an equal regard to the rights of all his heirs at law as defined by the statute of distribution, or that equality of division among his heirs which the law provides. The words "to share the same equally" may be given effect by being applied to the division between the classes of his heirs, and not to that between the four individuals who constituted all ²⁸⁸ his heirs at law. The administrator should be directed to distribute one-half of the residue to the surviving sister, and one-sixth each to the other three heirs.

Decree of probate court reversed.

Under a Devise of Property to be divided equally between two named persons and the children of another, such children take per stirpes, not per capita, if such appears to be intention of the testator from evidence aliunde: *White v. Holland*, 92 Ga. 216, 44 Am. St. Rep. 87. See, however, *Collins v. Feather*, 52 W. Va. 107, 94 Am. St. Rep. 912.

CROMWELL v. NORTON.

[193 Mass. 291, 79 N. E. 433.]

STATUTE OF FRAUDS.—If One Conveys to Another Land or Other Property Pursuant to an Oral Agreement, which the other refuses, and cannot be compelled to perform because within the statute of frauds, the value of the property can be recovered by the party who so conveyed it. (pp. 500, 501.)

STATUTE OF FRAUDS, Oral Evidence, Admissibility of Where Contract cannot be Enforced.—If one conveys property under and in pursuance of a contract not enforceable because not in writing, he may prove that fact by parol for the purpose of recovering the property so conveyed, where the grantee, relying upon the statute of frauds, refuses to perform the contract. (p. 501.)

STATUTE OF FRAUDS, Limitation of Actions Brought Under a Contract not Enforceable Because of.—If one receives a conveyance

of real property pursuant to an oral contract to reconvey it to the grantor, and such reconveyance being demanded, is refused, and the contract is nonenforceable because of the statute of frauds, and an action is then commenced to recover the value of the property, the statute of limitations as to such action does not commence to run until such demand and refusal. (p. 501.)

STATUTE OF FRAUDS, Sale of Land, When does not Constitute Repudiation of an Agreement.—If a conveyance is made and received under an oral contract to reconvey to the grantor when requested, and the grantee sells part of the property, accounting to the grantor for the proceeds, this is not a repudiation of the agreement, and does not put the statute of limitations in motion against an action to recover the value of the remaining property on the grantee's refusing to convey it as agreed. (p. 501.)

EVIDENCE that the Relations Between the Parties were Friendly and Kindly is not admissible in an action by a brother against his sister to recover the value of property which he claimed she had orally agreed to reconvey to him, she, on demand, having refused to make such conveyance, and taken advantage of the statute of frauds. (pp. 501, 502.)

B. T. Hillman, for the defendant.

W. A. Morse, for the plaintiff.

MORTON, J. This is an action to recover the value of certain real estate conveyed by the plaintiff to the defendant. The case was tried partly on agreed facts and partly on oral testimony. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to certain rulings and refusals to rule in regard to certain matters of evidence, and in regard to the statute of frauds and the statute of limitations, both of which defenses were set up in the answer.

The plaintiff's case was in substance this: In 1880, being about to go to sea, he conveyed the land in question to the defendant, who is his sister, so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted it at any time she should reconvey it to him. He returned, but the fact that he had given the deed of the land in question escaped his attention, as he testified, till it was recalled to him by her in 1902 in connection with another matter, when he demanded a reconveyance of the land, which she refused. The defendant contended that she was to sell a part of the land and pay over the proceeds, which she did in 1881, and that as to the rest, being the land in controversy, the conveyance was an absolute one, and she denied that there was any such agreement as alleged by the plaintiff. So far as the statute of frauds is concerned, the

case comes within the well-settled principle that if one conveys to another land or other property pursuant to an oral agreement, which such other party refuses to perform and cannot be compelled to perform because ²⁰³ within the statute, the value of the property so conveyed can be recovered by the party conveying it: *Kelley v. Thompson*, 181 Mass. 122, 63 N. E. 332; *Peabody v. Fellows*, 177 Mass. 290, 58 N. E. 1019; *Miller v. Roberts*, 169 Mass. 134, 47 N. E. 585; *Holbrook v. Clapp*, 165 Mass. 563, 43 N. E. 508; *O'Grady v. O'Grady*, 162 Mass. 290, 38 N. E. 196. Recovery is allowed in such a case, not as an indirect way of enforcing the contract, which would be contrary to sound principles, but on the ground that the refusal of the defendant to perform constitutes a failure of consideration, and he is therefore bound to make the plaintiff whole for what he has got from him. If the defendant is ready to perform, the fact that the contract is within the statute and he could set up the statute if he chose to is immaterial: *Twomey v. Crowley*, 137 Mass. 184. So is the exact nature of the undertaking on the part of the party refusing to perform—whether, for instance, it was to hold in trust or to reconvey: See *Twomey v. Crowley*, 137 Mass. 184. It follows that the oral testimony in regard to the agreement, to the admission of which the defendant objected, was rightly admitted, and that the ruling of the judge in regard to the statute of frauds was correct.

The statute of limitations did not begin to run until there was a demand for a reconveyance and a refusal, and the agreed facts show that that was not till 1902: *Ryder v. Loomis*, 161 Mass. 161, 36 N. E. 836. The fact that the defendant sold part of the property and accounted to the plaintiff for the proceeds did not constitute a repudiation of the agreement as to the remaining land, that in suit, and it would therefore have been wrong to instruct the jury, as the defendant requested, that if the agreement was as testified to by the plaintiff the sale constituted a violation of it, and the right of action accrued then and was barred by the statute. Full effect was given to the matter of the sale and accounting by the ²⁰⁴ instructions of the court, which left it to the jury to draw such inferences therefrom as they might deem proper in determining what the agreement actually was.

The testimony that was offered by the defendant as to acts of friendliness and kindness on the part of the defendant toward the plaintiff, and of their amicable relations, was

rightly excluded. It had no tendency to show that there was a consideration for the deed, and it was conceded by the plaintiff that the relations between them were entirely friendly and amicable down to 1902, when the plaintiff demanded a reconveyance.

We see no error in the rulings or refusals to rule or in the instructions to the jury.

Exceptions overruled.

If Part or All of the Purchase Money is paid under a parol contract for the sale of real estate, or if earnest money is advanced, and the vendor, for any reason, refuses to carry out the contract, or is unable to do so, the vendee may recover back the money which he has paid or advanced. The vendor, when he repudiates the contract, cannot invoke the aid of the statute of frauds to enable him to retain the money which he has received: See the note to Durham v. Wick, 105 Am. St. Rep. 793, on the recovery of money paid under a contract unenforceable because of the statute of frauds.

SHULTZ v. OLD COLONY STREET RAILWAY CO.

[193 Mass. 309, 79 N. E. 873.]

NEGLIGENCE IMPUTABLE.—The negligence of the driver of a vehicle is not to be imputed to a guest riding with him gratuitously and personally in the exercise of the care which ordinary caution requires. (pp. 511, 514.)

NEGLIGENCE OF DRIVER, When Precludes Recovery by a Person Riding with Him.—If one riding as a guest is injured by the negligence of a third person and the negligence of the driver, there can be no recovery therefor by the guest, if, in the exercise of common prudence, he ought to have given some warning to the driver of carelessness on his part which the guest observed, or might have observed, in the exercise of due care for his own safety, nor if he negligently abandoned the exercise of his own faculties and trusted entirely to the vigilance and care of the driver. (p. 515.)

Tort for personal injuries resulting from the collision of a carriage in which the plaintiff was riding as a guest and an electric car of the defendant.

The plaintiff asked the trial court to rule: "1. That if the plaintiff was not negligent in riding in the carriage and if the plaintiff in no way controlled the driver or directed the manner in which he should drive, then the plaintiff can recover if the defendant's motorman was negligent, and if his negligence in any way contributed to the collision, and the

fact that the driver of the carriage in which the plaintiff sat might also have been negligent is immaterial. 2. That if, at the time of this accident, the plaintiff was in the exercise of due care and the defendant's motorman was not, the verdict must be for the plaintiff." The request was refused, and the court instructed the jury as follows: "In this case, as in other tort cases which you have had, the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence, first, that she was in the exercise of due care; second, that the defendant, by its motorman or conductor or whoever was in charge of the car, was negligent; and, third, that the injuries that she complained of were received and were the result of the accident that happened and were the result of the negligence and carelessness of the defendant, and that she herself did not contribute toward the injuries which she claims to have received.

"The first question is, Was the plaintiff herself in the exercise of due care? She claims that she was riding in this buggy or carriage, which was being driven by a man of her acquaintance, over whom she exercised no control, and gave no directions as to the way in which he should drive the carriage; she trusted herself evidently to him; and that brings up an important question which enters into the question of her due care, and that is the question of the due care or carelessness of the driver of the team; for riding as she claims to have ridden, the driver of the team is the one whose conduct is to be inquired into, as to whether he was careful or careless in driving that team. If he was careless in driving it, and if his carelessness contributed to the injury which the plaintiff claims to have received, then the plaintiff is bound by his carelessness, and would not be entitled to recover. If he was careful in driving and she was careful on her part, then of course the question of due care on the part of the plaintiff would be sustained."

With respect to the question of negligence in the driving the court also said:

"Of course if you should find that the plaintiff was not in the exercise of due care, or this person who was driving the buggy was not in the exercise of due care, why the plaintiff cannot recover. The plaintiff has not sustained the burden of proof upon the first proposition."

The plaintiff took no exceptions to the ruling of the court. Verdict for the defendant; the plaintiff alleged exceptions.

D. R. Radovsky, for the plaintiff.

J. M. Swift, for the defendant.

⁸¹² RUGG, J. . This case fairly raises the question as to whether the negligence of the driver of a vehicle is to be imputed to a guest, riding with him gratuitously and personally in the exercise of all the care which ordinary caution requires. The first case in our own court, which occasioned any discussion as to the identification of a passenger with a driver, was *Allyn v. Boston etc. R. R.*, 105 Mass. 77. The injuries out of which that action grew were received at a crossing at grade of a highway and steam railroad. The plaintiff personally failed to exercise any care for his own safety at a place so well recognized as one of danger, and sought to recover by screening himself behind the due care of the driver. The court says respecting this contention: "If the plaintiff failed to use the care which prudence required, relying upon the vigilance of his companion, he must prove that Haskell was in the exercise of due care, not only in the management of his horse, but in using the necessary precautions to guard against danger from passing trains."

The subject was next before the court in *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583. Here one of the plaintiffs hired a hack of one of the defendants for the purpose of attending a funeral, and exercised no control over the actions of the driver of the carriage other than the purpose of hiring indicated. The injury occurred by reason of the negligence of the driver of the hack, in which the plaintiffs were riding, and the concurring negligence of the driver of another carriage. After repudiating the doctrine of *Thoroughgood v. Bryan*, 8 Com. B. 115, and referring with approval to *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652, and quoting from *Allyn v. Boston etc. R. R.*, 105 Mass. 77, the sentence above quoted, the court proceeds: "This was very different from saying that Haskell's negligence was to be imputed to the plaintiff, if he had been a passenger in a hack of which Haskell was the driver. It was merely saying that if, in a dangerous place, one person trusted another person to look out for him, he must show that such person used due care."

In *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001, the lower court was asked to rule: "That if the accident was

not due to the negligence of the defendant's driver alone, but was due partly also ³¹⁸ to the negligence of the plaintiff's driver, Marshallen, he could not recover." This was refused, but it was ruled that if the plaintiff "trusted to Marshallen the sole care and management of the team in which they were riding, and relied solely on the care and vigilance of Marshallen," then he must show due care on Marshallen's part." This instruction was held correct. And it was further said that the court did not mean to give the Allyn case "any further sanction than it now has."

Yarnold v. Bowers, 186 Mass. 396, 71 N. E. 799, was a case of collision at night upon a small lake between an unlighted rowboat not pursuing any regular course and a lighted steamer pursuing a regular course. It appeared that the plaintiff's intestate was standing in the rowboat at the time of the accident, when the danger was impending, obviously a careless thing to do, and failed to make any outcry or display any light or do anything for his own protection, and, so far as the rowing was concerned, trusted the entire charge of the boat to one Thorn, who was negligent. The court held that the case fell within the rule of Allyn v. Boston etc. R. R., 105 Mass. 77.

In Sullivan v. Boston Elevated Ry., 185 Mass. 602, 71 N. E. 90, Tilton v. Boston etc. R. R., 169 Mass. 253, 47 N. E. 998, Robbins v. Fitchburg R. R., 161 Mass. 145, 36 N. E. 752, Evensen v. Lexington etc. St. Ry., 187 Mass. 77, 72 N. E. 355, and on one branch of his claim in Halloran v. Worcester Consolidated St. Ry., 192 Mass. 104, 78 N. E. 381, the plaintiff based his own case upon the due care of the driver of the vehicle in which he was riding, thereby adopting the driver's acts as his own. In Creavin v. Newton St. Ry., 176 Mass. 529, 57 N. E. 994, and Le Blanc v. Lowell etc. St. Ry., 170 Mass. 564, 49 N. E. 927, the question of identification did not arise, as there was evidence in each case tending to show that the plaintiff actively exercised due care. The decision in Kane v. Boston Elevated Ry., 192 Mass. 386, 78 N. E. 485, was put upon the ground that the negligence of the defendant was not the cause of the accident to the plaintiff.

Imputed negligence has been the cause of somewhat conflicting decisions at various times in different jurisdictions. The doctrine had its rise in Thorogood v. Bryan, 8 Com. B. 115, which held that a passenger of one common carrier could not recover against a third person, whose negligence contrib-

uted to his injury, in the ³¹⁴ event that the negligence of the transporting carrier was a concurring cause of the injury. This case, decided in 1849, has been overruled in England in *The Bernina*, 12 P. D. 58; *Mills v. Armstrong*, 13 App. Cas. 1. Although cited as a supporting authority in *Allyn v. Boston etc. R. R.*, 105 Mass. 77, it was distinctly repudiated by this court in *Randolph v. O'Riordon*, 115 Mass. 337, 29 N. E. 583. The rule of *Thorogood v. Bryan*, 8 Com. B. 115, was early adopted in Wisconsin, and has continuously prevailed there: *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Otis v. Janesville*, 47 Wis. 422, 2 N. W. 783; *Olson v. Luck*, 103 Wis. 33, 79 N. W. 29; *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479, 102 N. W. 30. The Wisconsin court has made no distinction between a passenger of a common carrier and one riding gratuitously as the guest of the driver. It is the law of Michigan also, that where a person of years of discretion voluntarily enters the private conveyance of another and is injured by the carelessness of the person in charge of the conveyance concurrently with the negligence of a third person, the plaintiff is precluded from recovery against such third person: *Lake Shore etc. R. R. v. Miller*, 25 Mich. 274; *Schindler v. Milwaukee etc. Ry.*, 87 Mich. 400, 49 N. W. 670; *Cowan v. Muskegon Ry.*, 84 Mich. 583, 48 N. W. 186. In *Mullen v. Owosso*, 100 Mich. 103, 43 Am. St. Rep. 436, 58 N. W. 663, 23 L. R. A. 693, however, there was a vigorous dissenting opinion. This rule has been limited by the supreme court of Michigan so as to apply only to adults, the distinction being based upon the fiction that in such cases the relation of principal and agent exists, and it has been held that if the infant was so young as to lack the capacity to make the driver, at whose invitation she is riding as a guest, her agent, and where there is no evidence that either party supposed that such relation existed as a matter of fact, then the guest is not prevented from recovery by the neglect of the stranger at whose invitation she rides: *Hampel v. Detroit etc. R. R.*, 138 Mich. 1, 110 Am. St. Rep. 275, 100 N. W. 1002. The rule has been further limited so as not to apply to injuries received by one himself in the exercise of due care riding upon a fire-engine injured by the concurring negligence of a motorman of the defendant and the driver of the engine in which the plaintiff was riding, following the same rule adopted by this court in *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001; *McKernan v.*

Detroit Citizens' St. Ry., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347; ³¹⁵ and it does not apply to a passenger of one common carrier injured by the concurring negligence of it and another common carrier: Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 178, 10 N. W. 32. The authority of the Wisconsin and Michigan cases prevailed upon the court of Montana to adopt the same rule: Whittaker v. Helena, 14 Mont. 124, 43 Am. St. Rep. 621, 35 Pac. 904. Although Thorogood v. Bryan, 8 Com. B. 115, does not appear to have been called to the attention of the court in Carlisle v. Sheldon, 38 Vt. 440, the supreme court of that state has held any want of ordinary care on the part of a driver of a vehicle on the highway attributable to the one riding with him as guest.

In Pennsylvania, the rule of Thorogood v. Bryan, 8 Com. B. 115, was at first adopted: Lockhart v. Lichtenthaler, 46 Pa. 151; Philadelphia etc. R. R. v. Boyer, 97 Pa. 91. But these earlier cases have been overruled recently in Dean v. Pennsylvania R. R., 129 Pa. 514, 15 Am. St. Rep. 733, 18 Atl. 718, 6 L. R. A. 143; Bunting v. Hogsett, 139 Pa. 363, 23 Am. St. Rep. 192, 21 Atl. 31, 33, 34, 12 L. R. A. 268; Little v. Central District & Printing Telegraph Co., 213 Pa. 229, 62 Atl. 848. It has never been applied in that state to cases like the one at bar, where the plaintiff has always been permitted to go to the jury: Carlisle v. Brisbane, 113 Pa. 544, 57 Am. Rep. 483, 6 Atl. 372; Carr v. Easton, 142 Pa. 139, 21 Atl. 822.

The unbroken line of authority in all the other states in the Union is opposed to this reasoning. With some modifications in its application to particular cases, the general rule is that where the injured person and the driver do not occupy the position of master and servant, passenger and carrier, parent and child, and where the plaintiff is himself in the exercise of due care, having no reason to suspect carelessness or incompetency on the part of the driver, and is injured by the concurring negligence of the driver of the vehicle and some third person, the guest is not precluded from recovery against the third person by reason of the negligence of the driver. In Elyton Land Co. v. Mingea, 89 Ala. 521, 7 South. 666, the court says: "The rule must be regarded as now fully settled, both in England and America, and certainly in this state, that the negligence of the driver of a vehicle cannot be imputed to a passenger therein, when the passenger is free from personal negligence, and has no control over the driver, and has not been guilty of any want of care in his selection." The facts

in this case were somewhat similar to ³¹⁶ those in *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001, but the statement of the governing principle here and in the two following cases clearly include facts like those now before us: *Birmingham Ry. etc. Co. v. Baker*, 132 Ala. 507, 31 South. 618; *Vormus v. Tennessee R. R.*, 97 Ala. 326, 12 South. 111. In *Colorado etc. Ry. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, the rule was laid down, as applicable to occupants of private conveyances, that in case of a person injured by the negligence of a defendant, and the contributory negligence of one with whom the injured person is riding as a guest or companion, such negligence was not imputable to the injured person; although the exception to this rule was recognized, that when the injured person was in a position to exercise authority or control over the driver, or was guilty of negligence, or failed "to exercise such care under the circumstances as he could, and should, exercise under the particular circumstances to protect himself," there could be no recovery. The same rule has been declared by the supreme court of Arkansas, in *Hot Springs St. R. R. v. Hildreth*, 72 Ark. 572, 82 S. W. 245. In Illinois, in cases like the one at bar, the negligence of the driver is not imputed to the guest: *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481, 23 Am. St. Rep. 688, 25 N. E. 799, 10 L. R. A. 696; *Wabash etc. R. R. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *West Chicago St. R. R. v. Dougherty*, 209 Ill. 241, 70 N. E. 586; *Christy v. Elliott*, 216 Ill. 31, 108 Am. St. Rep. 196, 74 N. E. 1035, 1 L. R. A., N. S., 393.

A long series of decisions in Indiana supports the same view. It is forcibly expressed in *Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452, as follows: "The general principle deducible from the decisions is, that one who sustains an injury without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the injured person was not identified as above may have contributed thereto. . . . Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to

the injury sustained such a relation to each ³¹⁷ other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest of purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him": Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Louisville etc. Ry. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Chicago etc. R. R. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Lake Shore etc. Ry. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Indianapolis St. Ry. v. Johnson, 163 Ind. 518, 72 N. E. 571.

The supreme court of Iowa follows the same rule, using the language at page 319 in Nesbit v. Garner, 75 Iowa, 314, after saying that the relation of principal and agent must exist in fact in order to bar a recovery, that "The law will not create or presume the relation from the mere fact that he accepted the invitation of another to ride in his carriage. If he is but the guest of the other, neither has nor assumes the right to direct or control the conduct of the driver, neither he nor the owner can be regarded as his servant." The like doctrine has been adopted in Kansas (Leavenworth v. Hatch, 57 Kan. 57, 51 Am. St. Rep. 309, 45 Pac. 65), and in Kentucky, in Cahill v. Cincinnati Ry., 92 Ky. 345, 18 S. W. 2. See, also, Louisville Ry. v. Anderson, 25 Ky. Law Rep. 606, 76 S. W. 153. The same rule has been followed in State v. Boston etc. R. R., 80 Me. 430, 15 Atl. 436, and Neal v. Rendall, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668. An exception appears to exist in Maine, not founded on principle, but based upon statutory provisions, in actions against municipalities for injuries caused by defects in highways, where it is held that the rider, even though a guest, is responsible for the negligence of the driver: Barnes v. Rumford, 96 Me. 315, 52 Atl. 844. In Minnesota the rule respecting imputed negligence, excepting where the relation of parent and child or guardian and ward exists, is that "Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in ³¹⁸ the joint prosecution of a

common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all the others": *Koplitz v. St. Paul*, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74; *Teal v. St. Paul City Ry.*, 96 Minn. 379, 104 N. W. 945; *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763.

The same general rule prevails in Missouri: *Dickson v. Missouri Pacific Ry.*, 104 Mo. 491, 16 S. W. 381; *Holden v. Missouri R. R.*, 177 Mo. 456, 76 S. W. 973; *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106; and in Maryland: *Baltimore etc. R. R. v. State*, 79 Md. 335, 47 Am. St. Rep. 415, 29 Atl. 578; see *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603, 54 Atl. 660; *United Railways v. Biedler*, 98 Md. 564, 56 Atl. 813; and in New Hampshire: *Noyes v. Boscawen*, 64 N. H. 361; in California: *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152; and is supported by a long line of cases in New York, beginning with *Robinson v. New York etc. R. R.*, 66 N. Y. 11, 23 Am. Rep. 1. In *Brickell v. New York etc. R. R.*, 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449, a case like *Allyn v. Boston etc. R. R.*, 105 Mass. 77, the rule is held to be applicable only to cases where "the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an inclosure, and is without opportunity to discover danger and to inform the driver of it. . . . It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and to avoid it if practicable." But generally, in New York, the guest has not been barred of recovery by the negligence of the driver, as a matter of law, the circumstances in each case having been held to be such as to make the plaintiff's due care a question of fact: See *Robinson v. Metropolitan St. Ry.*, 91 App. Div. 158, 86 N. Y. Supp. 442; affirmed in 179 N. Y. 593, 72 N. E. 1150; *Van Vranken v. Clifton Springs*, 86 Hun, 67, 33 N. Y. Supp. 329; *Morris v. Metropolitan St. Ry.*, 63 App. Div. 78, 71 N. Y. Supp. 321; *Dyer v. Erie Ry.*, 71 N. Y. 228; *Masterson v. New York etc. R. R.*, 84 N. Y. 247, 38 Am. Rep. 510; *Phillips v. New York etc. R. R.*, 127 N. Y. 657, 27 N. E. 978; *Strauss v. Newburgh Electric Ry.*, 6 App. Div. 264, 39 N. Y. Supp. 998; *Bailey v. Jourdan*, 18 App. Div. 387, 46 N. Y. Supp. 399; ³¹⁹ *Mack v. Shawangunk*, 90 N.

Y. Supp. 760. The same rule has been laid down in Alabama etc. Ry. v. Davis, 69 Miss. 444, 13 South. 693. See Illinois Central R. R. v. McLeod, 78 Miss. 334, 84 Am. St. Rep. 630, 29 South. 76, 52 L. R. A. 954. The precise question has arisen in New Jersey, and the doctrine of imputed negligence of a driver to a voluntary passenger is not adopted: Consolidated Traction Co. v. Hoimark, 60 N. J. L. 456, 38 Atl. 684; Noonan v. Consolidated Traction Co., 64 N. J. L. 579, 46 Atl. 770. Thorogood v. Bryan, 8 Com. B. 115, is discredited there: New York etc. R. R. v. New Jersey Electric Ry., 60 N. J. L. 338, 38 Atl. 828; New York etc. R. R. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126. In an exhaustive opinion the supreme court of North Carolina has refused to adopt the doctrine of imputed negligence in Duval v. Atlantic Coast Line R. R., 134 N. C. 331, 101 Am. St. Rep. 830, 46 S. E. 750, 65 L. R. A. 722, and Crampton v. Ivie Bros., 126 N. C. 894, 36 S. E. 351. It has been repudiated, also, in Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558; Cincinnati St. Ry. v. Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340. In Metropolitan Street R. R. v. Powell, 89 Ga. 601, 16 S. E. 118, the supreme court of Georgia held that the plaintiff, under conditions almost exactly like those in the case at bar, might go to the jury. The same is true in North Dakota (Ouverson v. Grafton, 5 N. Dak. 281, 65 N. W. 676); Tennessee (Hydes Ferry Turnpike Co. v. Yates, 108 Tenn. 428, 67 S. W. 69); Delaware (Farley v. Wilmington etc. Electric Ry., 3 Penne. 581, 52 Atl. 543); Texas (Missouri etc. Ry. v. Rogers, 91 Tex. 52, 40 S. W. 956; Galveston etc. Ry. v. Kutac, 72 Tex. 643, 11 S. W. 127; Central Texas etc. Ry. v. Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351); Virginia (Atlantic etc. R. R. v. Ironmonger, 95 Va. 625, 29 S. E. 319); Washington (Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76); and in Nebraska (Hajsek v. Chicago etc. R. R., 68 Neb. 539, 94 N. W. 609); although, in the last-named state, in a case of joint enterprise between the driver and the plaintiff, the negligence of the driver has been imputed to the plaintiff: Omaha etc. Ry. v. Talbot, 48 Neb. 627, 67 N. W. 599.

The question of imputed negligence was before the supreme court of the United States in Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652, where the facts were similar to those in Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583. Thorogood v. Bryan, 8 Com. B. 115, was discredited as resting "upon indefensible ground," and the court lays

down the rule in this language: "That one cannot recover damages for an injury to ³²⁰ the commission of which he has directly contributed is a rule of established law and principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound; that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled in damages from the wrongdoer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person toward whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child, or guardian and ward, and the like." In the course of this opinion, *Dyer v. Erie Ry.*, 71 N. Y. 228, a case on all-fours with the one at bar, is cited with approval as a supporting authority. Relying upon *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652, as authority, the federal courts have refused to impute the negligence of the driver to a gratuitous passenger in a private conveyance: *Pyle v. Clark*, 75 Fed. 644, 79 Fed. 744, 25 C. C. A. 190; *Griffith v. Baltimore etc. R. R.*, 44 Fed. 574; *Union Pacific Ry. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800; *Sheffield v. Central Union Telephone Co.*, 36 Fed. 164; *Evans v. Lake Erie etc. Ry.*, 78 Fed. 782; *Honey v. Chicago etc. Ry.*, 59 Fed. 423. See *Delaware etc. R. R. v. Devore*, 114 Fed. 155, 52 C. C. A. 77; *Denver City Tramway Co. v. Norton*, 141 Fed. 599.

Text-book writers generally have also expressed the same view: 7 Am. & Eng. Ency. of Law, 2d ed., 447; 1 Thompson on Negligence, sec. 502; 1 Shearman and Redfield on Negligence, sec. 66; Beach on Contributory Negligence, sec. 115.

If the subject is considered apart from decided cases and upon sound reason, the same conclusion is reached. There is no abstract ³²¹ principle of law by which an innocent person, in the full possession and exercise of his faculties, and him-

self using due care, should be prohibited from recovery against a wrongdoer whose tortious act contributes as a proximate cause to his injury. It is familiar law that an injured person may recover against one or both of two wrongdoers between whom there is no concert of action, whose concurring act produces the injury, even though the act of either alone might not have caused any harm, when "no distinction can be drawn between their acts": *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69. Where the injury has resulted from the negligent act of another, the plaintiff may recover if such negligence was the efficient cause. In other phrase, where the defendant is the doer of a wrong, which causes an injury to a plaintiff, who is free from any contributory negligence, the circumstance that the negligence of a third party also contributed to the injury does not ordinarily bar recovery. The innocent injured plaintiff ought not to go remediless against one by whose wrongful act he was harmed. Under the conditions existing in the case at bar, recovery by the plaintiff can only be prevented by judicially imposing upon the purely humane, social or benevolent act of hospitality the fiction of assuming the contractual relation of principal and agent between the guest and host. Such relation in fact does not exist. The parties themselves would at once repudiate it, and indeed the association itself is repugnant to the thought of contract. Such a fiction ought not to be resorted to, except under the imperative requirement of some technical legal rule or to accomplish a manifest justice. Its invocation in the present case is not made necessary by such rule, and its application only serves to protect a wrongdoer from the natural consequences of his acts, so that it fails of justification on both grounds. In principle, apart from special rules often enacted by common carriers, there seems to be no greater or different duty resting upon the recipient of a gratuitous excursion in a private conveyance to direct the driver in the performance of his duty or to warn him of approaching risk than is imposed upon a passenger for hire occupying a seat beside a motorman in an electric car or driver of an omnibus. In either case, there is no contractual obligation. It is simply what, under all the ³²² circumstances, may be an exercise of due care. If the doctrine of principal and agent is to be applied to cases like the one now before us, its logic compels the application to the case of the passenger in the hired cab, and the imputation of the driver's negligence to

him. This seems to be the course followed in *Nicholls v. Great Western Ry.*, 27 U. C. Q. B. 382; *Winckler v. Great Western Ry.*, 18 U. C. C. P. 250. Moreover, it is but a rational extension of the rule to hold the gratuitous passenger, if he is to be precluded from recovery against a wrongdoer by reason of the negligence of his driver on the theory that the latter is his agent, himself liable also in an action of tort to anyone injured by the negligence of this same driver. If he is prevented from availing himself of a right of action for the wrong of another on the ground of the negligence of his agent, the converse of this proposition necessarily holds true. He must be responsible to a child negligently run down in the street by his host, who is driver and assumed agent. The responsibility of the invited guest for the negligence of his host must be coextensive with the agency. The purpose of the agency is the driving of the vehicle, and hence it follows that the guest will be liable for any injury negligently occasioned in the driving. If the driver's want of care is imputed to the guest when injury is received by him, to the same extent must the imputation exist when harm is inflicted. To thus press the doctrine of imputed negligence to its logical conclusion demonstrates its unsoundness. It is neither just nor reasonable, nor consonant with any principle of jurisprudence, to require the plaintiff to go remediless for a wrong committed against her by the defendant, which she neither contributed to, was responsible for, nor could have prevented. To send her out of court would be to punish the innocent and discharge the guilty.

The rule fairly deducible from our own cases, and supported by the great weight of authority by courts of other jurisdictions, is that where an adult person, possessing all his faculties and personally in the exercise of that degree of care which common prudence requires under all the attending circumstances, is injured through the negligence of some third person, and the concurring negligence of one with whom the plaintiff is riding as guest or companion, between whom and the plaintiff the relation ³²³ of master and servant or principal and agent, or mutual responsibility in a common enterprise, does not in fact exist, the plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover against the one through whose wrong his injuries were sustained. Disre-

garding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control or right of control of the actions of the driver, so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary, unconstrained, noncontractual surrender of all care for himself to the caution of the driver. .

Applying this statement of the law to the present case, the result is that the plaintiff would not be entitled to recover if in the exercise of common prudence she ought to have given some warning to the driver of carelessness on his part, which she observed, or might have observed in exercising due care for her own safety, nor if she negligently abandoned the exercise of her own faculties and trusted entirely to the vigilance and care of the driver. She cannot hide behind the fact that another is driving the vehicle in which she is riding, and thus relieve herself of her own negligence. What degree of care she should have exercised in accepting the invitation to ride, or in observing and calling to the attention of the driver perils unnoticed by him, depends upon the circumstances at the time of the injury. On the other hand, she would be permitted to recover if, in entering and continuing in the conveyance, she acted with reasonable caution, and had no ground to suspect incompetency and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver, was so sudden or of such a character as not to permit or require her to do any act for her own protection.

In view of the facts of the case, the requests for rulings presented by the plaintiff were not correct propositions of law, and were properly refused, but the portion of the charge excepted to failed to express with accuracy and fullness the rights of the plaintiff and the liability of the defendant to her. The jury were instructed to treat the plaintiff as identified with the ³²⁴ driver, and burdened with his negligence. For the reasons we have stated, and under the circumstances disclosed, this was not an accurate statement of the law. .

Exceptions sustained.

The Question Involved in the Principal Case is discussed in the recent note to *Hampel v. Detroit etc. R. R. Co.*, 110 Am. St. Rep. 291. Where a person employs a livery team with a driver to carry him to a specified place, the relation of master and servant does not exist between the passenger and the driver, neither are they engaged in a

joint enterprise. Therefore, the negligence of the driver in driving over a railroad track in front of an approaching train is not imputable to the passenger. The latter, however, is required to exercise reasonable care for his own safety: *Cotton v. Willmar etc. Ry. Co.*, 99 Minn. 366, 116 Am. St. Rep. 422.

KUHLEN v. BOSTON AND NORTHERN STREET RAILWAY COMPANY.

[193 Mass. 341, 79 N. E. 815.]

CARRIERS OF PASSENGERS for Hire Must Use the Highest Degree of Care consistent with the nature and extent of their business to provide safe and suitable vehicles for their carriage, and to maintain all such reasonable arrangements for the control and supervision of passengers and of their own servants as prudence dictates against all dangers that are naturally and according to the usual course of business to be expected. Such carriers are bound to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of that high degree of diligence and care to which they are held, they ought reasonably to have anticipated. (p. 518.)

CARRIERS OF PASSENGERS, Duty of to Protect from Other Passengers.—The duty of a carrier of passengers for hire to use all proper means and precautions to protect its passengers against injury caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is not less stringent than the obligation to prevent misconduct or negligence on the part of its own servants. (p. 519.)

CARRIERS OF PASSENGERS, Liability of for Injuries Due to Pushing and Crowding at Stations.—If a passenger, in entering a car, is pushed and crowded by other passengers, and thereby receives personal injuries, resulting in the fracture of her wrist, the railroad company may be held answerable, if, in the opinion of the jury, based upon and sustained by the evidence, the carrier ought to have anticipated what took place, and, in the exercise of ordinary care, ought to have taken reasonable precautions to guard against such injuries as were caused to the plaintiff, and was negligent in failing to take such precautions and to give plaintiff the adequate protection which she had the right to expect. (p. 520.)

CARRIERS OF PASSENGERS, Negligence in not Preventing Crowding at Stations.—If there is danger to passengers at a station at certain hours of the day from the crowding and pushing by other passengers, the jury should be left to say whether an increased number of servants should have been employed by the carrier to prevent such pushing and crowding and the consequent danger to passengers. (p. 521.)

CARRIERS OF PASSENGERS—Contributory Negligence, When not Imputable to Passenger on Entering a Station or Car Where There is Crowding and Pushing by Other Passengers.—Though a woman has been in crowds before at a railway station and seen the failure of a carrier to control them, it cannot be held, as a matter of

law, that she was not in the exercise of due care because she entered a station where such crowding and pushing were probable, and suffered injury therefrom. All these circumstances are important to be considered by the jury, but are not conclusive against her. (pp. 520, 521.)

CARRIERS OF PASSENGERS, Liability of, When not Excluded by the Fact that the Carrier did not Own or have Absolute Control of the Station Where Crowding and Pushing Occurred.—Though the station at which the pushing and crowding by passengers in attempting to enter cars occurred was not owned by, nor under the control of, the carrier, except that it might make regulations by the permission of a municipal transport commission, it is not relieved from liability to a passenger injured by the pushing and crowding by other passengers, if no rules had been adopted and no measures taken by which to prevent such crowding and pushing, and the carrier had held the place out as a proper one for its passengers to come for the purpose of taking its cars. (p. 522.)

Tort against the Boston Elevated Railroad Company and the Boston and Northern Street Railway Company. At the trial the action was discontinued as to the former corporation and prosecuted against the latter only. The plaintiff, by her pleadings, claimed to have been injured while a passenger in or upon defendant's premises at Schollay Square subway station in Boston; that she entered that station to take passage on one of the defendant's cars, having purchased a ticket entitling her to do so; that the defendant neglected to provide safe and suitable entrances, exits, passages, guards, and platforms, and allowed the platform to be overcrowded and obstructed, and wholly neglected to take reasonable precautions to insure that passengers entering the station would have safe and suitable access to the cars, and that, being a passenger and in the exercise of due care, she, through the negligence of defendant, was violently pushed and thrown down, and therefrom sustained severe personal injuries.

At the trial it was shown that the plaintiff, though living in Lynn, worked in Boston, and had, for three months prior to the accident, been accustomed to take a car at the subway station; that on the day of the accident, in accordance with her custom, after paying her fare and entering the station, she found there a large crowd attempting to get upon the cars; that she was pushed by this crowd, and thereby rendered helpless to protect herself, and was ultimately injured; that no servant of the defendant did anything to control the crowd or prevent the injury, though the conductor was present and laughing.

After the evidence was all received, the defendant asked that the jury be instructed as follows:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. The plaintiff was not in the exercise of due care.

"3. There is no evidence of negligence of the defendant, its servants or agents.

"4. The plaintiff assumed the risk of being jostled, and all danger and inconvenience incident thereto, when she entered into the crowd endeavoring to get upon the car.

"5. In choosing to travel on a street-car when the same was crowded, the plaintiff assumed the risk of injury incident to such crowding."

"7. If it is not practicable for the defendant to carry on its business without the crowding of its platforms and cars at certain hours of the day, it is not negligence on the part of the defendant to fail to employ a large force of men at those hours to prevent jostling and crowding at the entrance to the cars."

The instructions so requested were refused. A verdict was returned for the plaintiff, and the defendant excepted.

S. Parsons, for the defendant.

F. D. Allen and W. B. Murphy, for the plaintiff.

346 SHELDON, J. It is the duty of the defendant, as a carrier of passengers for hire, to use the highest degree of care consistent with the nature and extent of its business, not only to provide safe and suitable vehicles for their carriage, but to maintain all such reasonable arrangements for control and supervision both of the passengers and of its own servants as prudence would dictate to guard its passengers, while they occupy that relation, against all dangers that are naturally and according to the usual course of things to be expected. It is bound to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of that high degree of vigilance and care to which it is held, it ought reasonably to have anticipated. This is the unvarying doctrine of our own decisions: *Treat v. Boston etc. R. R.*, 131 Mass. 371; *Commonwealth v. Coburn*, 132 Mass. 555; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Dodge v. Boston etc. S. S. Co.*, 148 Mass. 207, 12 Am. St. Rep. 541, 19 N. E. 373, 2 L. R. A. 83. And its duty to use all proper means and precautions to protect its passengers against injuries caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been

guarded against, is no less stringent than the obligation to prevent misconduct or negligence on the part of its own servants: *Simmons v. New Bedford etc. S. S. Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Nichols v. Lynn etc. R. R.*, 168 Mass. 528, 47 N. E. 427. "There is no doubt of the duty of a railroad company to use all such means and precautions as are reasonably practicable for the protection and safety of its passengers, not only from the misconduct of its agents and servants, but also of other passengers and of other persons who are not passengers": *Allen, J.*, in *Brooks v. Old Colony R. R.*, 168 Mass. 164, 46 N. E. 566. In *United Railways v. Deane*, 93 Md. 619, 86 Am. St. Rep. 453, 49 Atl. 923, 54 L. R. A. 942, it was held in an elaborate opinion that a passenger on a street railway car could hold the railway company liable for an assault committed upon him by a drunken³⁴⁷ and disorderly passenger who had once been put off the car, but afterward had been allowed to get on again and ride without hindrance; and this upon the general ground that when the servants of a carrier know, or have the means of knowing, that a disorderly passenger is likely to commit an assault, it is their duty to eject him, as in *Vinton v. Middlesex R. R.*, 11 Allen, 304, 87 Am. Dec. 714, and their employer is liable for their neglect of this duty if it results in injury to another passenger. *McSherry, C. J.*, said in this case: "It is just as incumbent on the carrier to protect all his passengers from assault by a fellow-passenger when his servants have knowledge, or the means of knowing, that an assault on some one is imminent, and when they have time and means to avert it, as it is to protect all his passengers from injuries likely to result from defective means or methods of transportation." The same general doctrine has been maintained in other jurisdictions, so far as we are aware, without exceptions: *Muhlhouse v. Monongahela St. Ry.*, 201 Pa. 237, 50 Atl. 937; *Pittsburg etc. R. R. v. Pillow*, 76 Pa. 510, 18 Am. Rep. 424; *McGearty v. Manhattan Ry.*, 15 App. Div. 2, 43 N. Y. Supp. 1086; *Pittsburg etc. Ry. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Flint v. Norwich & New York Transp. Co.*, 34 Conn. 554, 6 Blatchf. 158, Fed. Cas. No. 4873; 7 Blatchf. 536, Fed. Cas. No. 4874; 13 Wall. 3, 20 L. ed. 556; *New Orleans etc. R. R. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689. Other cases bearing on the same subject are cited by *Loring, J.*, in *Jacobs v. West End Street Ry.*, 178 Mass. 116, 59 N. E. 639. The cases of *Thomson v. Manhattan Ry.*, 75 Hun, 548, 27 N. Y. Supp. 608, *Putnam v. Broadway etc. R. R.*, 55 N.

Y. 108, 14 Am. Rep. 190, Ellinger v. Philadelphia etc. R. R., 153 Pa. 213, 34 Am. St. Rep. 697, 25 Atl. 1132, Graeff v. Philadelphia etc. R. R., 161 Pa. 230, 41 Am. St. Rep. 885, 28 Atl. 1107, 23 L. R. A. 606, and Corman v. Eastern Counties Ry., 4 Hurl. & N. 781, relied upon by the defendant, either turn upon the proposition that as a common carrier can be held liable for injury done by one passenger to another only upon proof that it has failed to discharge its duty of using the utmost vigilance to maintain order and guard against violence, so it must be shown that the circumstances which called for special action either were known, or in the exercise of proper care ought to have been known, to the defendant or its servants, or else lay down the rule (perhaps sometimes carried too far) that the carrier is not to be held ³⁴⁸ liable for a mere breach of courtesy from one passenger to another.

There was evidence that there was usually a large crowd in the subway station at this time of the day; that there had been on many previous occasions the same surging and struggling to get upon the car as occurred at this time; that the jury had a right to find, as under the careful instructions of the court they must have found, that the defendant and its servants ought to have anticipated just what actually did take place, and ought, in the exercise of the necessary care, to have taken reasonable precautions to guard against such injuries as were caused to the plaintiff, and that they were negligent in failing to take such precautions and to give to the plaintiff that degree of protection which she had a right to expect from them. It follows that the defendant's third request for instructions was rightly refused.

Nor could its seventh request have been given. It was for the jury to say whether or not, if the crowding of its platforms and cars at certain hours of the day was unavoidable in carrying on its business, that high degree of care which it was bound to exercise called for the employment of an increased number of men to prevent such jostling and crowding at the entrance of the cars as would involve danger to passengers, and whether or not it was reasonable, in view of the nature and extent of the defendant's business, to require this precaution to be taken.

It could not have been said as matter of law that the plaintiff herself was not in the exercise of due care, or that she had assumed the risk of the injury that was done to her. She had been in similar crowds before, had seen the same pushing and

struggling and the same failure on the part of the defendant to control the assemblage; and she had formerly so narrowly escaped injury that she said in testifying: "Many a night I have almost got killed." With the knowledge gained by this experience, however, she joined in the general rush to get into the car. All these circumstances were important to be considered by the jury in passing upon the question of her due care; and their attention was called to these circumstances by the presiding judge in his charge. But they are not conclusive against her as a matter of law. The jury might say that, in spite of the ³⁴⁹ failure of the defendant's servants and agents to control the crowd on previous occasions, she might depend somewhat on the hope that they would not continue to fall short of their duty. And it is hard to see how the same circumstances which simply require the question of the defendant's negligence to be left to the jury can be conclusive as against the plaintiff to show either that she was negligent or that she assumed the risk. We think that these questions also were for the jury: *Treat v. Boston etc. R. R.*, 131 Mass. 371; *Simmons v. New Bedford etc. S. S. Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Gaynor v. Old Colony etc. Ry.*, 100 Mass. 208, 97 Am. Dec. 96. Accordingly, the defendant's first, second, fourth and fifth requests could not have been given.

The subway and this station were built by the Boston Transit Commission, which alone had the power to make or authorize any change therein, and were the property of the city of Boston. The defendant's occupation thereof was either under a lease, or merely permissive: Stats. 1894, c. 548, sec. 23 et seq.; Stats. 1897, c. 500, secs. 5, 12. See *Falkins v. Boston etc. Ry.*, 188 Mass. 153, 74 N. E. 338; *Hilborn v. Boston etc. Ry.*, 191 Mass. 14, 77 N. E. 646. For the purpose of showing the conditions of its occupation of the subway, the defendant offered in evidence a written agreement between the Boston Elevated Railway Company, the lessee of the subway, and the Lynn and Boston Railroad Company, to whose rights the defendant has succeeded; and the only remaining question arises upon the defendant's exception to the exclusion of this agreement, a copy of which is annexed to the bill of exceptions. The defendant refers to the fact that in the case last cited it appeared by the agreement of the parties "that the subway and the stations in it were constructed by the Boston Transit Commission, and are owned by the city of Boston; that the platform at this station is now of the same width and in the

same condition as constructed by the transit commission; that the Boston Elevated Railway Company operates its cars in the subway under a lease of the subway, and that the defendant operates its cars therein under permission of said elevated company authorized by the legislature; that the elevated company has the entire management, charge and control of the subway, the stations and platforms, ³⁵⁰ except that it can make alterations therein only by the permission of the Boston Transit Commission": *Hilborn v. Boston etc. Ry.*, 191 Mass. 14, 77 N. E. 646. The defendant contends that this agreement, if it had been admitted, would have proved in the case at bar the same facts which were agreed upon in that case, and says that it had no control or management of the station, and could not have limited the number of persons admitted thereto.

The main purpose of this agreement appears to have been to determine the amount of money to be paid by the defendant for its use of the subway, and to regulate the other pecuniary relations between the parties. The thirteenth clause, however, provides "that the cars of said Lynn and Boston Company, while on the tracks of, or leased to, the elevated company either within the subway or without, shall be subject to the rules and regulations [sic] of said elevated company, and the reasonable direction of its officials." There was no offer to show what "reasonable directions," if any, had been given to the defendant, or what rules, if any, had been established by the elevated company. Nor was there any offer to show that the defendant had not been given full power to make whatever police arrangements might be necessary for the proper supervision of any expected crowds or passengers; and if the defendant had such power, it could be held liable under the circumstances of this case. In view of the fact—which appears to have been conceded at the trial—that the defendant held this out as the proper place for its passengers to come to for the purpose of taking its cars, so that its passengers had a right to regard themselves as having come thither by its invitation, we do not see that the defendant was injured by the exclusion of this agreement. The general principle has been established that one who, though not strictly in control of a defective thing or dangerous place, yet uses it for his own benefit or for his purposes invites another to enter it, may, if other elements of liability concur, be held responsible to the latter for an injury caused by the defect or danger: *Heaven v. Pender*, 11 Q. B. D. 503; *Poor v. Sears*, 154 Mass. 539, 26 Am.

St. Rep. 272, 28 N. E. 1046; Carleton v. Franconia Iron & Steel Co., 99 Mass. 216; Cotant v. Boone Suburban Ry., 125 Iowa, 46, 99 N. W. 115, 69 L. R. A. 982. The details of this agreement do not appear to have been at all ³⁵¹ material to the issues raised at the trial. The effect of admitting the agreement might have been to distract the attention of the jury from the real issues of the case. We find no error at the trial.

Exceptions overruled.

A Common Carrier is under a duty to protect each passenger from insult, indignities, and personal violence, whether the disturbance to the passenger's peace, comfort, or personal security comes from another passenger, a trespasser, or an employé of the carrier: Nashville etc. Ry. Co. v. Flake, 114 Tenn. 671, 108 Am. St. Rep. 525; Brunswick etc. R. R. Co. v. Ponder, 117 Ga. 63, 97 Am. St. Rep. 152; Birmingham Ry. etc. Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43. The duty and liability of street railway companies toward their passengers are discussed in the note to Thompson v. Gardner etc. St. Ry. Co., ante, p. 459.

WELCH v. SWASEY.

[193 Mass. 364, 79 N. E. 745.]

CONSTITUTIONAL LAW—Police Power.—The legislature may limit and regulate personal rights and rights of property in the interest of the public health, morals and safety. (pp. 529, 530.)

CONSTITUTIONAL LAW—Limiting the Height of Buildings.—The legislature may limit the height of buildings in a city, so that none can be erected above a prescribed number of feet. (pp. 530, 531.)

CONSTITUTIONAL LAW—Different Heights of Buildings in Different Districts.—The legislature may classify the different parts of a city, so that in some parts one height is prescribed for buildings, and in others a different height. (p. 532.)

CONSTITUTIONAL LAW—Height of Buildings, Delegation to Commission of the Power to Prescribe.—It is permissible to delegate to a commission the determination of the boundaries of the districts in which buildings may be at different heights. (p. 532.)

CONSTITUTIONAL LAW—Height of Buildings.—To a commission may be delegated the making of rules and regulations such as permit different heights of buildings in different parts of one of the general classes of territory. (pp. 532, 533.)

CONSTITUTIONAL LAW—Height of Buildings.—The regulations of a commission authorized to fix the height of buildings may be tested by the courts to see whether they are reasonably necessary to the accomplishment of the purpose on which the constitutional authority to fix the height of buildings rests. Though a rule

or ordinance will not be held void merely because the courts differ from the legislature as to the expedience of its provisions, yet if a regulation or ordinance is arbitrary and unreasonable, so as necessarily to be subversive of the rights of property, it will be set aside by the courts. (p. 533.)

CONSTITUTIONAL LAW—Building, Regulations of the Height of with Respect to the Widths of Public Streets.—The court cannot say that a regulation that a building in a designated class shall not be a greater height than eighty feet unless its width on each and every public street on which it stands will be at least one-half of its height was entirely for aesthetic reasons. (p. 534.)

MANDAMUS, Questions Which may be Tried upon.—Upon an application for mandamus to compel the issuing of a permit to erect a building of a greater height than permitted by a statute, if it is constitutional, the court may dispose of the case on the merits by determining the constitutionality of the statute. (p. 534.)

Petition for a writ of mandate to the members of the board of appeal from the building commissioner of the city of Boston to direct such commissioner to grant a permit for the erection of a building at the corner of Arlington and Marlborough streets. The permit for such building had been refused by the building commissioner on the ground that it would, if erected, exceed in height the limit permitted by the statutes of 1904, chapter 333, and the statute of 1905, chapter 383, and the order of the commissioner thereunder.

The statute of 1904 relied upon as authorizing the refusal of the permit, was as follows:

“Section 1. The city of Boston shall be divided into districts of two classes, to be designated districts A and B. The boundaries of the said districts, established as hereinafter provided, shall continue for a period of fifteen years, and shall be determined in such manner that those parts of the city in which all or the greater part of the buildings situate therein are at the time of such determination used for business or commercial purposes shall be included in the district or districts designated A, and those parts of the city in which all or the greater part of the buildings situate therein are at the said time used for residential purposes or for other purposes not business or commercial, shall be in the district or districts designated B.

“Section 2. Upon the passage of this act the mayor of the city shall appoint a commission of three members to be called ‘Commission on Height of Buildings in the City of Boston.’ The commission shall immediately upon its appointment give notice and public hearings, and shall make an order establishing the boundaries of the districts aforesaid, and, within one

month after its appointment, shall cause the same to be recorded in the registry of deeds for the county of Suffolk. The boundaries so established shall continue for a period of fifteen years from the date of said recording. Any person who is aggrieved by the said order may, within thirty days after the recording thereof, appeal to the commissioner for a revision; and the commissioner may, within six months after its appointment, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk, and shall date back to the original date of the recording. The members of the commission shall serve until the districts have been established as aforesaid; and any vacancy in the commission caused by resignation, death or inability to act shall be filled by the mayor, on written application by the remaining members of the commission or of ten inhabitants of the city. The members of the commission shall receive such compensation as the mayor shall determine.

“Section 3. In the city of Boston no building shall be erected to a height of more than one hundred and twenty-five feet above the grade of the street in any district designated A, and no building shall be erected to a height of more than eighty feet above the grade of the street in any district designated B. These restrictions shall not apply to grain or coal elevators or sugar refineries in any district designated A, nor to steeples, domes, towers, or cupolas, erected for strictly ornamental purposes, of fireproof material, on buildings of the above height or less in any district. The supreme judicial court and the superior court shall each have jurisdiction in equity to enforce the provisions of this act, and to restrain the violation thereof.

“Section 4. This act shall take effect upon its passage.”

The statute of 1905, chapter 383, relative to the height of building, is as follows:

“Section 1. Within thirty days after the passage of this act the mayor of the city of Boston shall appoint a commission of three members to determine, in accordance with the conditions hereinafter provided, the height of buildings within the district designated by the commission on height of buildings in the city of Boston as district B, in accordance with chapter three hundred and thirty-three of the acts of the year nineteen hundred and four.

“Section 2. Said commission shall immediately upon its appointment give notice and public hearings, and shall make

an order establishing the boundaries of or otherwise pointing out such parts, if any, of said district B as it may designate in which buildings may be erected to a height exceeding eighty feet, but not exceeding one hundred feet, and the height between eighty feet and one hundred feet to which buildings may be so erected, and the conditions under which buildings may be erected to said height, except that such order may provide for the erection of buildings as aforesaid to a height not exceeding one hundred and twenty-five feet in that portion of said district B which lies within fifty feet from the boundary line separating said district B from the district designated by commission on height of buildings in the city of Boston as district A in accordance with said chapter three hundred and thirty-three, provided said boundary line divides the premises affected by such order from other adjoining premises both owned by the same person or persons, and within sixty days after its appointment shall cause the same to be recorded in the registry of deeds for the county of Suffolk. Any person who is aggrieved by such order may, within sixty days after the recording thereof, appeal to the commission for a revision; and the commission may, previous to the first day of January in the year nineteen hundred and six, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk and shall date back to the original date of recording. The boundaries so established shall continue for a period of fifteen years from the date of recording of the order made by the commission on height of buildings in the city of Boston under chapter three hundred and thirty-three of the acts of the year nineteen hundred and four. The members of the commission shall receive such compensation as the mayor shall determine.

“Section 3. Within such parts of district B as may be designated by the commission as aforesaid (which may, except as hereinafter provided, include any parts of said district B affected by prior acts limiting the height of buildings) buildings may be erected to the height fixed by the commission as aforesaid, exceeding eighty feet but not exceeding one hundred feet, or one hundred and twenty-five feet as hereinbefore provided, and subject to such conditions as may be fixed as aforesaid by the commission; but within the following described territory, to wit: Beginning at the corner of Beacon street and Hancock avenue, thence continuing westerly on Beacon street to Joy street, thence continuing north-

erly on Joy street to Myrtle street, thence continuing easterly on Myrtle street to Hancock street, thence continuing southerly on Hancock street and Hancock avenue to the point of beginning, no building shall be erected to a height greater than seventy feet, measured on its principal front, and no building shall be erected on a parkway, boulevard or public way on which a building line has been established by the board of park commissioners or by the board of street commissioners, acting under any general or special statute, to a greater height than that allowed by the order of said boards; and no building upon land any owner of which has received and retained compensation in damages for any limitation of height or who retains any claim for such damages, shall be erected to a height greater than that fixed by the limitation for which such damages were received or claimed.

“Section 4. No limitations of the height of buildings in the city of Boston shall apply to churches, steeples, towers, domes, cupolas, belfries or statuary not used for purposes of habitation, nor to chimneys, gas holders, coal or grain elevators, open balustrades, skylights, ventilators, flagstaffs, railings, weather vanes, soil pipes, steam exhausts, signs, roof houses not exceeding twelve feet square and twelve feet high, nor to other similar constructions such as are usually erected above the roof line of buildings.

“Section 5. This act shall take effect upon its passage.”

On July 5, 1904, the commissioners appointed by the mayor of Boston, under the statute of 1904, made an order establishing the boundaries of districts under that statute. In July, 1905, the same persons having been appointed commissioners under the statute of that year, made another order, as follows:

“The undersigned having been appointed on May 25, 1905, by the Mayor of the City of Boston, under the provisions of chapter 383 of the Acts of 1905, members of a commission to determine, in accordance with the provisions of said acts, the height of buildings within the district designated by the Commission on Height of Buildings in the City of Boston, as District B, in accordance with chapter 333 of the Acts of 1904, and having given notice and public hearings, hereby determine and order that in any of the Districts B, as designated by said Commission on Height of Buildings, in its order of July 5, 1904, as amended by its order of December 3, 1904, the said orders being recorded with Suffolk Deeds, book 2976, page 45, and book 3008, page 129, respectively,

buildings may be erected on streets exceeding sixty-four (64) feet in width, to a height equal to one and one-quarter times the width of the street upon which the building stands; and, if situated on more than one street, the widest street is to be taken, the height to be measured from the mean grade of the curbs of all the streets upon which the building is situated, and not exceeding one hundred (100) feet, in any event.

“If the street is of uneven width, its width will be considered as the average width opposite the building to be erected.

“The width of a street shall be held to include the width of any space on the same side of the street upon which a building stands, upon or within which space no building can be lawfully erected by virtue of any building line established by the Board of Street Commissioners or the Board of Park Commissioners acting under general or special laws.

“All streets or portions of streets upon which buildings may be erected on one side only shall be considered as of a width of eighty (80) feet as to that portion upon which buildings may be erected on one side only.

“In the case of irregular or triangular open spaces formed by the intersection of streets, the width of the street shall be taken as the width of the widest street entering said space at the point of entrance.

“No building shall, however, be erected on a parkway, boulevard or public way on which a building line has been established by either of said boards acting under general or special laws to a height greater than that allowed by said general or special laws, not otherwise in violation of section 3 of said chapter 383, Acts of 1905.

“No building shall be erected to a height greater than eighty (80) feet unless its width on each and every public street upon which it stands will be at least one-half its height.

“Nothing in this order shall be construed as affecting any condition or restriction imposed by deed, agreement or by operation of law on any property in said District B.

“The said Commissioners further provide that buildings may be erected to a height not exceeding one hundred and twenty-five (125) feet in that portion of the District B as established by the Commission on Height of Buildings in its order dated December 3, 1904, recorded with Suffolk Deeds, book 3008, page 129, which lies fifty (50) feet westerly from

the boundary line running from Columbus avenue to the centre of Boylston street, separating said District B from District A, as established by said order; provided, however, that said portion of District B is owned by the same person or persons who own the adjoining premises in District A.

“In witness whereof, the undersigned, being a majority of said commission, the third member (Nathan Matthews) being in Europe, hereto set their hands, this 21st day of July, 1905.

“JOSEPH A. CONRY,

“HENRY PARKMAN,

“Commission on Height of Buildings in the City of Boston.”

B. E. Eames, for the petitioner.

T. M. Babson, for the respondents.

³⁷² KNOWLTON, C. J. The principal question presented by this case is whether the Statutes of 1904, chapter 333, and the Statutes of 1905, chapter 383, and the orders of the commissioners appointed under them, relative to the height of buildings in Boston, are constitutional. A jurisdictional question, if the petitioner is entitled to relief, is whether a remedy can be given him by a writ of mandamus.

The principal question may be subdivided as follows: 1. Can the legislature, in the exercise of the police power, limit the height of buildings in cities so that none can be erected above a prescribed number of feet? 2. Can it classify parts of a city so that in some parts one height is prescribed and in others a different height? 3. If so, can it delegate to a commission the determination of the boundaries of these different parts, so as to conform to the general provisions of the statute? 4. Can it delegate to a commission the making of rules and regulations such as to permit different heights in different places, according to the different conditions in different parts of one of the general classes of territory, made in the original statute? 5. If it can, are the rules and regulations made by the commissioners within the statute, and within the constitutional authority of the legislature and its agents?

In the exercise of the police power the legislature may regulate and limit personal rights and rights of property in the ³⁷³ interest of the public health, public morals and public safety: *Commonwealth v. Pear*, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935; *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136; *California Reduction Co. v. Sanitary Re-*

duction Works, 199 U. S. 306, 26 Sup. Ct. Rep. 100, 50 L. ed. 204. With considerable strictness of definition, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power: *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136.

The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light and air, and thus to affect the public health. It may also increase the danger to persons and property from fire, and be a subject for legislation on that ground. These are proper subjects for consideration in determining whether, in a given case, rights of property in the use of land should be interfered with for the public good. In *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77, this court said: "Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments in the exercise of the police power, for the safety, comfort, and convenience of the people and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned: *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Salem v. Maynes*, 123 Mass. 372; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27." In *People v. D'Oench*, 111 N. Y. 359, 18 N. E. 862, a statute limiting the height of dwelling-houses to be erected in the city of New York was treated as unquestionably constitutional: See 1 Abbott on Municipal Corporations, sec. 125; 2 Tiedeman on State and Federal Control, sec. 150. There is nothing in *Parker v. Commonwealth*, 178 Mass. 199, 59 N. E. 634, against the validity of the statutes now before us. That case was decided upon the construction given by the court to the legislative act under which it arose. The court held that the legislature had not assumed to determine that any limitation of the height of buildings on the designated streets was required, in the interest of the public health and public safety, or of the public welfare, and it left open the question whether the legislature might have made the restriction, without providing compensation, if it had declared in the statute that no damages should be paid. It is for the legislature to determine whether the public health or public safety requires such a limitation of the rights of land owners in ³⁷⁴ a given case. Upon a determination in the affirmative, they may legislate accordingly.

The next question is whether the general court may establish different heights for different neighborhoods, according to their conditions and the uses to which the property in them is put. The statute should be adapted to the accomplishment of the purposes in which it finds its constitutional justification. It should be reasonable, not only in reference to the interests of the public, but also in reference to the rights of land owners. If these rights and interests are in conflict in any degree, the opposing considerations should be balanced against each other, and each should be made to yield reasonably to those upon the other side. The value of land and the demand for space, in those parts of Boston where the greater part of the buildings are used for purposes of business or commerce, is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used for residential purposes. It was, therefore, reasonable to provide in the statute that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter.

The general subject is one that calls for a careful consideration of conditions existing in different places. In many cities there would be no danger of the erection of high buildings in such locations and of such a number as to affect materially the public health or safety, and no statutory restrictions are necessary. Such restrictions in this country are of very recent origin, and they are still uncommon. Unless they place the limited height at an extreme point, beyond which hardly anyone would ever wish to go, they should be imposed only in reference to the uses for which the real estate probably will be needed, and the manner in which the land is laid out, and the nature of the approaches to it.

It was decided in *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 108 Am. St. Rep. 494, 74 N. E. 601, 69 L. R. A. 817, that a statute of this kind cannot constitutionally be passed for a mere aesthetic object. It was said in *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77, that the statute then before the court, enacted under the right of eminent domain, ³⁷⁵ with compensation for land owners, would have been unconstitutional if it had been passed "to preserve the architectural symmetry of Copley Square," or "merely for the benefit of individual property owners." The inhabitants of a city or town cannot be compelled to give up

rights in property, or to pay taxes, for purely aesthetic objects; but if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary. We are of opinion that the provisions of the Statutes of 1904, chapter 333, for dividing parts of the city into two classes, in each of which there is a prescribed limit for the height of buildings, was within the power of the legislature, and in accordance with the constitutional principle applicable to the enactment.

The delegation to a commission of the determination of the boundaries of these parts for the two classes was within the constitutional power of the general court. The work of the commissioners under the first act was not legislation, but the ascertainment of facts, and the application of the statute to them for purposes of administration. Such subsidiary work by a commission is justified in many cases: *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142; *Brodbine v. Revere*, 182 Mass. 598, 66 N. E. 607; *Commonwealth v. Sisson*, 189 Mass. 247, 109 Am. St. Rep. 630, 75 N. E. 619, 2 L. R. A., N. S., 752; *Stark v. Boston*, 180 Mass. 293, 62 N. E. 375; *Kingman, Petitioner*, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417; *Taunton v. Taylor*, 116 Mass. 254; *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693; *Commonwealth v. Bennett*, 108 Mass. 27; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495, 36 L. ed. 294; *In re Kollock, Petitioner*, 165 U. S. 526, 17 Sup. Ct. Rep. 444, 41 L. ed. 813.

The delegation to a commission of the power to fix different heights in different places in the parts included in Class B, under the Statutes of 1905, chapter 383, goes further, and allows the commissioners to make rules and regulations which are in the nature of subsidiary legislation. This is within the principle referred to in *Brodbine v. Revere*, 182 Mass. 598, 66 N. E. 607, and in some of the other cases above cited. It is that, under our system in Massachusetts, matters of local self-government might always be intrusted to the inhabitants of towns. On the establishment of cities this power is exercised by the city council, or by some board or commission representing the inhabitants. Even in towns such powers have long been exercised by local boards, for example, ³⁷⁶ by the board of health. Originally, such representatives of the local authority were elected by the people; but for many years local boards, appointed by the governor or other ex-

ecutive authority, have sometimes been intrusted with the exercise of this legislative authority. It is true that they are further from the people than the members of a city council, for whom the people vote, but in a true sense they represent the inhabitants in matters of this kind. Our decisions cover this point also: *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142; *Brod-bine v. Revere*, 182 Mass. 598, 66 N. E. 607.

It does not follow that all rules and regulations made under such a delegation of authority would be constitutional, merely because the original statute is unobjectionable. Such rules may be tested by the courts to see whether they are reasonably directed to the accomplishment of the purpose on which the constitutional authority rests, and whether they have a real, substantial relation to the public objects which the government can accomplish. A statute, ordinance or regulation will not be held void merely because the judges differ from the legislators as to the expediency of its provisions. But if it is arbitrary and unreasonable, so as unnecessarily to be subversive of rights of property, it will be set aside by the courts: *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *New York Health Department v. Trinity Church*, 145 N. Y. 32, 39 N. E. 383, 27 L. R. A. 710; *Chicago etc. Ry. v. Drainage Commissioners*, 200 U. S. 561, 26 Sup. Ct. Rep. 341, 50 L. ed. 596; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 26 Sup. Ct. Rep. 100, 50 L. ed. 204; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. Rep. 18, 49 L. ed. 169; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed. 643.

We do not see that the action of the commissioners, under the Statutes of 1905, was beyond their power under the constitution. It was seemingly in accordance with the general purpose of the legislature, and was directed to considerations which they deemed proper in adjusting the rights and interests of property owners and the public. The question is not whether the court deems all the provisions wise; but whether they appear to be outside of the constitutional power of the commission. In prescribing heights in the district, the commissioners might make the width of the streets on which a building was to be erected one factor to be considered. Their

action in this particular ³⁷⁷ relates wholly to buildings in Class B, which includes only the residential parts of the city.

We cannot say that the prohibition of the erection of a building of a greater height than eighty feet in Class B, unless its width "on each and every public street upon which it stands will be at least one-half its height," was entirely for aesthetic reasons. We conceive that the safety of adjoining buildings, in view of the risk of the falling of walls after a fire, may have entered into the purpose of the commissioners. We are of opinion that the statutes and the orders of the commissioners are constitutional.

We think that the court has jurisdiction to dispose of the case on the merits, under this petition for a writ of mandamus. The wrong alleged is that the building commissioner, and afterward the board of appeal, refused to give the petitioner a permit to erect a building. It is conceded that the petitioner was not entitled to a permit if the statutes and orders referred to are constitutional. He alleges that the board of appeal refused to do their duty, and that his only effectual remedy is by a writ of mandamus, ordering them to grant a permit. The case comes within the general rule giving jurisdiction to issue such writs: *Farmington River Water Power v. County Commissioners*, 112 Mass. 206; *Carpenter v. County Commissioners*, 21 Pick. 258; *Attorney General v. Boston*, 123 Mass. 460. See *Locke v. Selectmen of Lexington*, 122 Mass. 290; *Attorney General v. Northampton*, 143 Mass. 589, 10 N. E. 450.

The building commissioner and the board of appeal are not judicial officers: Stats. 1892, c. 419; Stats. 1894, c. 443. The fact that a refusal to act is founded on a mistake of law does not preclude a remedy by a writ of mandamus. In cases where the duty to perform an act depends solely on the question whether a statute or ordinance is constitutional and valid, the question may sometimes be determined on a petition for a writ of mandamus: *Attorney General v. Boston*, 123 Mass. 460; *Warren v. Charlestown*, 2 Gray, 84; *Larcom v. Olin*, 160 Mass. 102, 35 N. E. 113.

Petition dismissed.

The Constitutionality of Building Regulations is the subject of a note to *Bostock v. Sams*, 93 Am. St. Rep. 405. An ordinance conferring arbitrary power upon the city council in the matter of regulating the erection of buildings is unconstitutional: *Boyd v. Board of Council*, 117 Ky. 199, 111 Am. St. Rep. 240.

COFFEY v. COFFEY.

[193 Mass. 398, 79 N. E. 742.]

EXECUTORS AND ADMINISTRATORS.—An administrator cannot be permitted, by virtue of his trust, to take an advantage which he would not otherwise possess with reference to his own indebtedness to the estate. (p. 536.)

EXECUTORS AND ADMINISTRATORS—Accounting by cannot be Affected by the Fact that a Fraud Redounded to the Benefit of a Person Interested in the Estate.—The fact that a son who, as agent of his mother, misappropriated rents collected by him, with the consent of his brother, then living, and applied them to the benefit of property owned by the two brothers, cannot prevent his being liable to account for such rents on his appointment as administrator of his mother's estate, though the persons to be benefited by such accounting are children of such brother, he and the mother having both died in the meantime. (p. 536.)

Appeal from a decree in probate respecting the final account of James H. Coffey, administrator of the estate of Bridget Coffey, deceased. The contestants were the children of John H. Coffey, a son of the decedent and brother of the administrator. The item in dispute related to indebtedness of the administrator, arising from his having, in the lifetime of his mother, collected certain rents due to her and which he testified he had, with the consent of his brother, applied in payment of claims on property owned by them; the contestants having become on his death the heirs at law of said John H. Coffey, they thereby benefited by the application thus made of the rents so collected. The trial jury nevertheless charged the administrator with such rents, and he alleged exceptions.

C. H. Conant, for the accountant.

A. W. Putnam and M. L. Sullivan, for the contestants.

³⁹⁹ RUGG, J. The facts disclosed in this case are that James J. Coffey acted as the agent for his mother, Bridget Coffey, in the collection of certain rents of real estate. Without her assent he expended these rents, with the consent of his brother then living, now deceased, who was the father of the present contestants, upon property in which he and his brother were jointly interested. The only question raised by the exceptions is whether these minor children, having received by inheritance the property upon which the expenditure was made, can insist that this indebtedness to the estate of

their grandmother be paid by the accountant. The accountant's rights can be no greater than if he were not the administrator of the estate. He cannot be permitted by virtue of his trust position to gain an advantage, which he would not otherwise possess, with reference to his own indebtedness to the estate: *Stickney v. Clement*, 7 Gray, 170. If some other person than himself had been appointed administrator of the estate of Bridget Coffey, the facts, which the accountant professed, would have constituted no answer by such appointee to ⁴⁰⁰ the claims of the present contestants. The accountant was dealing with the rents of his mother's property in a way which he clearly had no right to do, and under such circumstances as to make himself indebted to her. It has chanced that his wrongful dealing with this income has, inadvertently and without any consent on their part or opportunity to prevent it, redounded to the advantage of the contestants. This accident cannot be used by the accountant to shield himself from the consequences of his own indebtedness to his mother, nor enable him to enforce against the heirs of his brother a claim which might or might not have turned out to be well grounded if his brother had survived: *Abbott v. Foote*, 146 Mass. 333, 4 Am. St. Rep. 314, 15 N. E. 773.

Exceptions overruled.

Persons Occupying Fiduciary Relations in respect to property are disqualified to deal therewith for their personal benefit: *Turner v. Fryberger*, 94 Minn. 433, 110 Am. St. Rep. 375. It has been affirmed, however, that a purchase of the trust property by the trustee is not necessarily void: *Shelby v. Creighton*, 65 Neb. 485, 101 Am. St. Rep. 630; and that a purchase by an administrator, at his own sale, is voidable merely: *Mason v. Odum*, 210 Ill. 471, 102 Am. St. Rep. 180.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

FIRST NATIONAL BANK OF DETROIT v. CURRIE.

[147 Mich. 72, 110 N. W. 499.]

BILLS AND NOTES.—The Undertaking of the Indorser of a check is, that if the check is not paid on presentation within a reasonable time he will pay it, provided he is properly notified. The reasonable time for presentation and demand for payment is within the day following the indorsement. (p. 541.)

BILLS AND NOTES.—The Indorsee of a Check, as between himself and the indorser, undertakes to demand payment within the day following the indorsement, and, if payment is not made, to give due notice of dishonor. (p. 541.)

BILLS AND NOTES.—The Fact that There are No Funds in the account against which a check is drawn does not relieve the holder from the duty of presenting it and giving notice of dishonor, unless the indorser knows the facts. (p. 541.)

BILLS AND NOTES.—The Right of the Indorser of a Check to presentation and notice of dishonor is not changed because he will suffer no apparent damage from a failure of the indorsee to take these steps. (p. 541.)

BILLS AND NOTES.—The Certification of a Check on presentation by an indorsee is equivalent to payment, discharging the drawer as well as the indorsers, notwithstanding the absence of funds. (pp. 542, 545.)

BILLS AND NOTES.—The Certification of a Check on presentation by the indorsee discharges the indorser, although the check is presented, payment refused, and the indorser notified within the time within which notice would have been given had there been no certification. (p. 542.)

BILLS AND NOTES.—The Certification of a Check procured by an indorsee, who thereupon parts with value, creates a new contract, whereby the certifying bank becomes the primary debtor. (p. 543.)

BILLS AND NOTES.—Where an Indorsee of a Check Procures Its Certification and then parts with value, the subsequent in-

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solvency of the certifying bank is immaterial on the question of the indorser's liability. (p. 545.)

BILLS AND NOTES.—Where the Indorser of a Check has been discharged by the indorsee procuring a certification, the consent of the indorser to an extension of time for payment does not revive his liability, since there is no consideration for his promise. (pp. 545, 546.)

H. E. Spalding and A. C. Angell, for the appellants.

Dickinson, Stevenson, Cullen, Warren & Butzel, for the appellee.

⁷³ McALVAY, C. J. Defendants were in partnership as brokers at Detroit. They dealt in stocks and bonds on the New York Stock Exchange and elsewhere. They executed orders for dealings in the New York market through other brokers. Frank C. Andrews was their ⁷⁴ largest customer. On February 5, 1902, they had bought for Andrews and on his order, but in their own name, as was customary, \$90,000 par value of Union Pacific convertible four per cent bonds for \$95,000, in New York, through Ladenburg, Thalman & Co., who were to make delivery on payment. Shortly after noon February 6, 1902, Mr. Andrews asked Mr. Case, defendants' office manager, to arrange to wire the price of these bonds to New York. Mr. Case arranged with the State Savings Bank to wire \$45,000, and then asked Mr. Smith, plaintiff's assistant cashier, if they would wire \$50,000 to New York for Frank C. Andrews, and was told that they would for seventy-five cents per \$1,000. It was plaintiff's custom to charge for remittances made by wire for Andrews, but not to charge for remitting for defendants. When Andrews returned, Case reported to him that the arrangement could be made, and Andrews gave him two checks on the City Savings Bank, payable to defendants' order, for \$50,000 and \$45,000, respectively, directing him to have Ladenburg, Thalman & Co. deliver the bonds to the firm of Warren, Andrews & Co., of New York, of which firm Andrews was a member. The \$50,000 check, being the one involved in this litigation, reads as follows:

"\$50,000. Detroit, Mich., Feb. 6, 1902.

"Pay to the order of Cameron Currie and Co.

"Fifty Thousand.....Dollars.

"Value received, and charge the same to account of

"F. C. ANDREWS.

"To the City Savings Bank, Detroit."

Defendants indorsed this check as follows:

“Pay First National Bank, Detroit, Mich., or order.

“CAMERON CURRIE & CO.”

Mr. Case deposited this check to the credit of defendants' account in plaintiff bank and at the same time drew and gave to the bank defendants' check for a like sum payable to the order of plaintiff's cashier, and directed the plaintiff to wire its New York correspondent to pay that ⁷⁵ amount to Ladenburg, Thalman & Co., and paid the amount of plaintiff's charge for transferring the funds. Immediately upon the deposit of the Andrews check in the plaintiff bank, defendants wired Ladenburg, Thalman & Co., as follows:

“Please deliver to Warren, Andrews and Co., 90,000 Union Pacific convertibles free. National Park will pay you \$45,000, National Bank of Commerce for our credit.

“CAMERON CURRIE & COMPANY.”

This was received by Ladenburg, Thalman & Co. at 1:12 P. M. eastern standard time. Upon receiving the deposit of the Andrews check indorsed by defendants, and defendants' own check with their directions for wiring money, the plaintiff sent the Andrews check to the City Savings Bank for certification. It was presented by plaintiff's messenger to Joseph Schrage, paying teller of said bank, who had authority to certify checks drawn on his bank, and who certified by writing across its face the words “Good, Schrage, Teller.” The check was then returned to plaintiff, which then, at 12:35 P. M. central standard time (1:35 P. M. eastern standard time) sent to its New York correspondent, the National Bank of Commerce, a telegram as follows:

“Deposit to the credit of Cameron Currie & Co., Fifty Thousand dollars with Ladenburg, Thalman & Co. and charge to our account.

“FIRST NATIONAL BANK OF DETROIT.”

After payment was made by the National Bank of Commerce, as ordered by this telegram, the payment of \$45,000 having been made through another bank, the bonds were delivered between 2 and 3 o'clock eastern standard time, by Ladenburg, Thalman & Co., to Warren, Andrews & Co.

Defendants had previously had numerous transactions with Andrews in which they took his check but never had his check certified. Plaintiff had previously received at different times

checks given by Andrews to defendants, ⁷⁶ given, as it supposed, for stocks, and did not understand anything different about this transaction. Plaintiff had itself had a number of transactions with Andrews shortly before this date, and one for a large amount on this same day, in which it received Andrews' check on the City Savings Bank. In every case it procured certification of the check before parting with the securities in payment for which it was given. Plaintiff and the City Savings Bank were members of the Detroit clearing-house. Plaintiff received this check after 12:15 P. M., the time of the noon meeting of the clearing-house at which checks payable at the different banks were ordinarily presented, and this check in the usual course of business would not be presented through the clearing-house until the next day. Defendants knew of this method of presenting through the clearing-house. On the next day this check and other certified checks amounting to \$662,000, drawn by Andrews on the City Savings Bank and held by different banks, were, by agreement between them, not presented through the clearing-house on account of Andrews' statement that the presentation would embarrass the City Savings Bank. This certified check was on that day (February 7th) presented by plaintiff at the City Savings Bank, payment refused, and the check protested. Andrews' account at this bank, both when the check was certified and when payment was demanded, was overdrawn more than \$900,000. The City Savings Bank had, on February 6th, when the check was certified, and on the 7th, when it was presented, funds of its own ample in amount to pay the check. Notice of protest was duly given by Mr. Smith personally handing the same to Mr. Osborne, one of the defendants. Whether Mr. Osborne saw the check at this time is not certain. There is no evidence that he ever saw it before or had anything to do with taking it. On February 8th the plaintiff received from defendants the following paper signed by Mr. Osborne in the firm name:

⁷⁷ "We hereby consent that the time of the payment of the check of Frank C. Andrews for \$50,000 dated Feb. 6th, 1902, and indorsed by us and deposited with the First National Bank for credit on our account on that date, be extended pending the action of the Bankers' Committee.

"Detroit, Mich., Feb. 8th, 1902.

"CAMERON CURRIE & CO."

No further presentation was ever made. A verdict was directed for plaintiff for the amount of the check, with interest. Defendants claim that the court erred in directing such a verdict. The contentions on their behalf are:

“1. That the certification of the check for plaintiff at its request was equivalent to payment, and operated to release them as indorsers.

“2. That plaintiff, on presenting the check, elected to take certification, which is the obligation of the drawee bank to pay, and deferred formal presentation of the certified check for payment until the next day. Had it demanded payment instead of certification, or upon certification, as it should, the check would either have been paid or dishonored. If dishonored the plaintiff would not have remitted, and the bonds would not have been delivered, but remained in defendants' control. Whether paid or dishonored neither party would have lost anything. So that plaintiff's failure to demand payment at the time of certification caused the loss, and defendants cannot be held therefor.”

The dispute in this case is between the indorsee and the indorsers of a check. The following rules of the law-merchant fixing the rights, duties and liabilities of indorsee and indorser each to the other, and the effect of certification by the drawee bank upon such rights, duties, and liabilities, are well settled. The undertaking of the indorser of a check is that, if not paid on presentation within a reasonable time, he will pay it, provided he is properly notified. Such reasonable time for presentation and demand for payment is admitted to be within the day following the indorsement. The indorsee, as between⁷⁸ himself and the indorser, undertakes to demand payment within the day following the indorsement, and, if payment is not made, to give due notice of dishonor. This is his sole duty, and he does anything else at his peril: 2 Daniel on Negotiable Instruments, 5th ed., sec. 1601; People v. Cromwell, 102 N. Y. 477, 7 N. E. 413. The fact that there are no funds in the account against which the check is drawn does not relieve the holder from presentation and notice of dishonor to the indorser, unless it appears that the indorser knew it: 2 Daniel on Negotiable Instruments, 5th ed., sec. 1596; 1 Morse on Banks and Banking, 4th ed., sec. 262, subd. 8. Nor are the rights of the indorser changed because he suffered no apparent damage by reason of failure to demand payment and give notice of dishonor to him within the required time:

Mohawk Bank v. Boderick, 13 Wend. 133, 27 Am. Dec. 192; *Tiedeman on Commercial Paper*, sec. 442; *Gough v. Staats*, 13 Wend. 549; *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500, 40 Am. St. Rep. 499, 55 N. W. 1064.

The certification of a check by a bank that it is "good" "is similar to the accepting of a bill, for he [the banker] admits hereby assets, and makes himself liable to pay": Lord Mansfield in *Robson v. Bennett*, 2 Taunt. 388.

"By the law-merchant of this country the certificate of the bank that the check is good is equivalent to acceptance; it implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume": Mr. Justice Swayne in *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

Where the check is drawn against funds, the certification, if procured by the payee or indorsee, discharges both maker and indorser, because equivalent to payment: 2 Daniel on Negotiable Instruments, 5th ed., sec. 1604; ⁷⁹ *Metropolitan Nat. Bank of Chicago v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403, 37 N. E. 533, 12 L. R. A. 492.

The important question in the case at bar is whether certification of a check on presentation by the indorsee, though there are no funds, is equivalent to payment. As a general proposition we think it is, as to both the maker and indorser: 2 Daniel on Negotiable Instruments, 5th ed., sec. 1604, and cases cited. The rules of the law-merchant are inflexible and arbitrary, and necessarily so. An indorser may always insist that the conditions requisite to make his undertaking enforceable shall be strictly complied with; namely, presentation for payment and notice of dishonor. As to the indorsee, the certifying bank is bound by estoppel where he has changed his position or parted with value on the strength of the certification: *Brooklyn Trust Co. v. Toler*, 65 Hun, 187, 19 N. Y. Supp. 975, 138 N. Y. 675, 34 N. E. 515, and cases cited.

In this case the plaintiff parted with no value before certification, but, relying upon the certification, transferred \$50,000 to New York. We find, then, that as between the plaintiff and the bank there was a new and enforceable contract created by

the certification of the check. Ordinarily, there would be no question but that such condition released the indorsers. In this case, however, it is claimed that, although the check had not been presented for payment, but for certification, yet upon it as certified payment was demanded, and the check was protested, and notice duly given within the time which the same would have been given had the check been presented for payment instead of certification, and because defendant indorsers have suffered no loss by reason of certification, and are in no different position than if such payment had been demanded, therefore they are not released as indorsers. The claim that no loss has occurred to defendants, which we think is not supported by the facts in the case, can be eliminated, for the reason that the liability of the indorser is not predicated upon his loss: See cases cited, *supra*. The case relied upon by plaintiff to sustain its ⁸⁰ contention, and also by the court in directing the verdict, is *Irving Bank v. Wetherald*, 36 N. Y. 335. We think the cases are distinguishable. In that case the note had been discounted by the indorsers who received the proceeds at the time. It was, therefore, a completed transaction between the indorsers and the indorsee. The indorsee, a bank, presented the note when due at the bank where it was payable and had it certified. Later in the day the certifying bank discovered that there were no funds to pay the note, and before 3 o'clock P. M. notified the holding bank, which refused to recognize the notice. The certifying bank then took up the note, presented it at its own counter, protested it, and notified the indorsers. The certifying bank sued the indorsers. The case recognizing the well-established doctrine that a bank is estopped from denying its certification of a note as good where the presenting bank relies upon its accuracy and fails to protest the note for nonpayment and thus releases the indorsers, holds that, where the mistake in certification is discovered, and notice given to the presenting bank in time to make a representation and charge the indorsers, the certifying bank is discharged from further liability, and that the certifying bank in this case took the note as a purchaser, and acquired the rights of a holder, and could maintain its action against the indorsers. The discounting bank received notice of the mistake before it in any way changed its position. It had not parted with value nor released the indorsers on the strength of the certification, otherwise the certification would have been binding.

In the case at bar the plaintiff parted with value on the strength of the certification. No enforceable contract was entered into between the parties to this suit because plaintiff never parted with value relying upon the indorsement. As between the certifying bank and the plaintiff there could be no revocation by the bank. There was no claim of mistake on the part of the certifying bank or any attempt to revoke its certification. If the certification was ⁸¹ in law a fraud, it was the fraud of Andrews and the certifying bank, of which neither of the parties to this suit had knowledge. The presentment of the certified check to the certifying bank and its nonpayment was the repudiation by the bank of its independent contract of certification made with the plaintiff. This check as it was when the indorsers parted with it to the indorsee was never presented for payment. The certification was made without the knowledge or consent of the indorsers. Applying to this case the decision in the Wetherald case, so far as it has any bearing upon the questions here involved, it is authority for holding that the certifying bank could not avoid liability on its certification for the reason that plaintiff had parted with value on the strength of it.

It was urged in the trial court, and is urged in this court, that the certification of the check in the absence of funds did not operate to release the maker from his liability thereon, and therefore the indorsers can occupy no better position than the maker, and are not released, and upon this theory the trial court decided the case. No authorities are cited to us and we have been able to find none which support this proposition. As already stated, it is a general rule of law where the holder of a check procures its certification by the bank upon which it is drawn, the drawer and all parties thereto are discharged. The relations of the different parties to a check and the nature of their contracts have already been sufficiently stated. The certification is an entirely new and different contract. By it the certifying bank becomes the primary debtor. The holder has released the makers and indorsers, and voluntarily accepted the obligation of the certifying bank. It is not unlawful for one to draw checks upon an overdrawn account. Neither is it unlawful for the bank to pay such a check and to charge the amount thereof against the drawer. In such case, as in any other case, the holder who obtains a certification has elected to accept the ⁸² obligation of the bank instead of cash. So far as the drawer is concerned, the check is paid because the

holder, by securing certification, obtained what he desired as payment. The bank had been directed to pay cash, and when the holder obtained what he preferred to cash, it was none the less a payment. The rule which releases the maker and indorsers of a check upon certification procured by the holder is not predicated upon the presence of funds in the hands of the certifying bank, but upon the principle that such certification operates as payment, discharging the maker whose contract has been fulfilled, and the indorser who was the guarantor of such fulfillment. If, in considering this proposition of law, the question of what relation may have been created between the bank and the maker in case of a certification in the absence of funds is eliminated as a factor, the correctness of our reasoning is in our judgment conclusive. The insolvency of the certifying bank after the certification is a circumstance which is likely to disturb our judgment of the legal question, because it occasioned this suit. That fact is entirely immaterial to the question, the rights of the parties having been fixed before that insolvency was known, and they were utterly ignorant of its possibility. Our conclusion is, therefore, that the general rule applies to this case and discharges the drawer as well as the indorsers, notwithstanding the absence of funds.

It is urged that defendants, by giving plaintiff the memorandum of February 8th, above referred to, thereby recognizing their liability and assuming and exercising control over the check, have waived any defense upon the ground that by the act of the plaintiff they were released as indorsers. At the time this memorandum was made, the maker and indorsers of this check had been released by the voluntary act of the plaintiff. Instead of the original undertaking of defendants, an entirely new contract had been entered into between the plaintiff and the certifying bank, in which the certifying bank was the primary debtor. ⁸⁸ This memorandum, then, if it operates to create a liability on the part of the defendants, cannot be the reviving or continuing of pre-existing relations between the parties to this check, but must be a new contract of suretyship on the part of the defendants of the certification by the bank. A thing which is absolutely different from, and foreign to, their original undertaking. The doctrine that an indorser may waive the laches or lack of formalities on the part of the holder which, in strictness, were necessary to charge him as such indorser, is recognized, but that doctrine

cannot be invoked where the maker and indorser have been discharged by a payment of the obligation upon which they were liable. The defendants in this case could be held as sureties for the certifying bank only by entering into a new contract of suretyship. That contract would require a consideration. The writing referred to is based on no consideration and therefore it does not, and cannot, constitute such contract.

Upon the undisputed facts in this case the defendants were entitled, as a matter of law, to an instructed verdict in their favor. The court was in error in not granting their request to that effect.

The judgment is reversed, and a new trial ordered.

Carpenter, Blair, Ostrander, and Moore, JJ., concurred.

If the Holder of a Check Procures It to be Certified, such certification is, as between the holder and drawer, a payment, and discharges the drawer from liability: *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403; *Anderson v. Gill*, 79 Md. 312, 47 Am. St. Rep. 402; *Born v. First Nat. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312. It is otherwise, however, when the drawer for his own benefit gets the check certified and then delivers it to the holder: *Minot v. Russ*, 156 Mass. 458, 32 Am. St. Rep. 472; *Cincinnati Oyster etc. Co. v. National Lafayette Bank*, 51 Ohio St. 106, 46 Am. St. Rep. 560.

A Bank Which Certifies a Check is estopped, as against the holder, to deny that it possesses sufficient funds of the drawer to pay it: *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403.

TOWNSHIP OF BANGOR v. BAY CITY TRACTION AND ELECTRIC COMPANY.

[147 Mich. 165, 110 N. W. 490.]

HIGHWAYS—Bill to Remove Railway Tracks.—A township may maintain a bill in equity to compel the removal of railway tracks laid in its highways without the consent of its authorities. (p. 551.)

HIGHWAYS—Estoppel to Remove Railway Tracks.—The acquiescence of the officers of a township in the unauthorized laying of railway tracks in its highways does not estop the township from maintaining a bill in equity to compel the removal of the tracks. (p. 551.)

Pierce & Kinnane, for the complainants.

T. A. E. & J. C. Weadock, for the defendant.

¹⁶⁵ HOOKER, J. The defendant purchased a street railway constructed in a highway, within the township of Bangor, in Bay county. The township files this bill alleging that the railway was built without the consent, and against the repeated protests, of the township authorities, and has ¹⁶⁶ been so maintained and operated ever since. It prays the removal of the road. A hearing was had upon the merits, on pleadings and proofs taken in open court, and the bill was dismissed upon the ground that the court of chancery had no jurisdiction in such a case, unless given by statute; that the only statute upon which jurisdiction can be predicated is 1 Compiled Laws, section 433, and that such statute applies only where an encroachment is shown; that this statute was not intended to modify the rule that where the law affords a plain, speedy and adequate remedy, such remedy should be sought, instead of a remedy in equity, and that an adequate legal remedy is provided by 2 Compiled Laws, sections 4121-4126. As a further ground, the learned circuit judge said that the case was within the rule followed in the cases of *Township of Lebanon v. Burch*, 78 Mich. 641, 44 N. W. 148, and *Township of Greenfield v. Norton*, 111 Mich. 53, 69 N. W. 95.

We infer from the defendant's brief that the testimony sustains the bill upon the point that the railway was built without obtaining authority from the township in the way pointed out by statute, but defendant seems to rely on an estoppel, based on the acquiescence of the officers of the township, or failure to take steps to prevent the construction of the railway. The testimony shows that the construction of the railway began in 1889. The highway commissioner was informed that work was being done in the highway, and a meeting of the township board was held soon after to consider what should be done, and the board looked over the premises where the work was being done. The record of this meeting shows:

"Before calling the meeting to order the board proceeded to examine the highway between sections 9 and 10, town 14 north, range 5 east, pursuant to the request of the highway commissioner in the township of Bangor, and ascertained the following facts, viz.: The West Bay City Street Railway Company is constructing a street railway on the highway running north and south between said sections, using dirt from near the center of the highway for the construction of said railway, and grading on ¹⁶⁷ the east side of said highway, and whereas

said railroad proposes to secure lands on the west side of the said highway to widen the highway, and the people adjoining said highway are satisfied, therefore it is

“*Resolved*, That the board take no action at the present and leave the consideration for some future date.

“*Carried.*”

The supervisor had some talk with officers of the company, and was informed that it was its intention to buy as much land on the west side of the highway as it was using of the highway on the east side, and to widen the highway to that extent, and this project was talked over at the meeting. Action was purposely deferred to see if that should be done. The railway company proceeded to complete the railway. It neither bought the land nor widened the street. The township officers complained several times about the condition of the highway, but could get nothing done. The township board took no further action until some years after.

In June, 1902, notice was served by the township authorities on the receivers of the railway company demanding a removal of the road from the highway, for reasons enumerated in the notice. On August 14, 1902, Mr. Weadock, the managing receiver of the railway company, and in charge and control of the business of the company, had some negotiations with the township officers upon his application, and was present at one or more meetings of the township board, and these negotiations resulted in the granting of a franchise for a railroad along the highway in question to the United Traction Company, its successors and assigns, upon terms and conditions stated therein. The record of the township treats this as an application of the Bay Cities Consolidated Street Car Company “for a franchise of its road through Bangor township, on the east side of the line between sections 9 and 10 and 3 and 4.” The record states the fact of the arrival of Mr. Weadock, the examination of the premises upon the question of a proposed doubling of the track, and that Mr. Weadock paid the expenses of the ¹⁶⁸ meeting. The record of August 16, 1902, shows a meeting on that date, and an adjournment of the meeting to August 20th, “to meet Mr. Weadock, the receiver.” The record of the meeting held on August 20th is significant. It states that the township board met on that date pursuant to adjournment, to consider the terms and conditions on which “a franchise might be granted to the United Traction Company, formerly known as the ‘Bay Cities Con-

solidated Street Railway Company' running its cars on the line of the highway'' (describing it). It continues: "This road was first built in 1889, by Fisher, Aplin and Magill without acquiring any right to lay their track in the highway. The first mile was then an established highway, and the second mile was private property, and now, when the township had entered an action to oust them, they apply for a franchise."

It shows that Weadock, receiver, and E. S. Dimmock, general manager, were present representing the United Traction Company, and that Mr. Weadock presented "the request of his company" for a franchise for thirty years and a right to lay a single or a double track, and to charge a five-cent fare on these two miles. The substance of the negotiations follow. Again, Mr. Weadock paid the costs of the meeting, and the franchise was agreed upon and was entered in the record. At that time it was contemplated that the road would soon be sold at receiver's sale, and the purpose of asking for the franchise was understood to be to give the purchaser a franchise under which it could operate the road, and it was given in the name of a company not then in existence, to avoid giving another later, it being expected that it would be transferred to such company as should purchase the road. The road was sold to the Bay Cities United Traction Company, a company organized for the purpose of purchasing it, and this franchise was assigned to it, without any consideration, other than reimbursing the receiver for the expense incurred in procuring it. The Bay Cities United Traction Company ¹⁶⁹ was afterward consolidated with the traction and power company, under the statute, taking the name of the Bay City Traction and Electric Company. It is said that, either before or after such consolidation, it was determined not to operate the road under this franchise, and the new company has refused to comply with its terms.

The points relied upon by the defendant seem to be: 1. That the court has no jurisdiction of this cause, because there is an adequate remedy at law, if complainant's claim is valid; 2. That it is estopped from asking the relief sought, because of the acquiescence of its officers in the building and maintenance of the road, it being contended also that the proceedings of 1902 have no force as against this defendant.

A railway which was built in a highway without authority of law is not rightfully there, and the public has a right to have it removed, whether it be called an encroachment, an ob-

struction, or a nuisance. Defendants appear to contend that this is neither an obstruction nor a nuisance, for the reason that we have held that the use of public highways, by street railway companies, is a legitimate use of the highway, and does not create an additional servitude upon the land of the adjoining proprietor, and that it must, therefore, be an encroachment or a trespass; if the former, not the subject of equitable relief; and, if the latter, waived by the conduct of the officers. While a railroad, lawfully constructed on a highway, and rightfully there, cannot be held to be an unlawful obstruction of, or encroachment upon, the highway, it is an obstruction in the sense that any structure or new use may be an obstruction to its use by the public generally to a greater or less extent. Thus in the case of *Attorney General v. Bay State Brick Co.*, 115 Mass. 431, it was held that a track laid across the highway by the owner of lands adjacent, by the consent of the township authorities, might be an obstruction, and, if the surveyors should so determine (the surveyors being public officers authorized to determine ¹⁷⁰ such questions), a court of equity would not review their action, notwithstanding the consent of the township authorities. The inference deducible is that, though the person who built the track owned the fee of the highway, and might use it so long as his use did not interfere with the public use (though they reserved that question), when it should appear, as matter of repair, that the railway interfered with public travel and the proper use of the highway, it was an obstruction. The case contains an intimation that such tracks might be considered inconsistent with the use of the public, but, as already said, that question was not decided. This defendant was not an adjacent land owner, and has no color of right to occupy the street except such as the statutes then in force conferred, and, in building its line, placed an obstruction in the way, of which the township authorities had a right to complain and to take measures to remove, and we hesitate to say that it may not have been a nuisance which they might ask equity to abate, for we think that it does not follow, from the recognition of a lawful street railroad, as a proper adjunct to a highway, that an unlawfully constructed one cannot be a nuisance: See *Elliott on Roads and Streets*, 2d ed., secs. 644, 802, and cases cited. If it is so claimed, equity has jurisdiction to try the question, and the township may bring the suit, as we held in *Township of Merritt v. Harp*, 131 Mich. 174, 91 N. W. 156.

The cases of Township of Lebanon v. Burch, 78 Mich. 641, 44 N. W. 148, and Township of Greenfield v. Norton, 111 Mich. 53, 69 N. W. 95, upon which defendant rests its contention that equity is not the proper forum to seek redress in a case of this kind, were cases of encroachment by adjacent proprietors. The opinion in the former cases indicates that the court was considering cases where the land owner seeks to extend his adjacent occupancy beyond the highway line, and the discussion applied to cases where the proceeding is to settle highway lines, cases there said to be peculiarly within the jurisdiction of highway officers, and in which class of cases it was held there was no occasion ¹⁷¹ for resort to equity, unless possibly under some peculiar circumstances which cannot generally exist: See, also, City of Grand Rapids v. Hughes, 15 Mich. 54, defining encroachment. The case of Township of Greenfield v. Norton, 111 Mich. 53, 69 N. W. 95, was a similar case, a barn being erected partly in the highway. We are of the opinion that if this cause can be said to be within the general rule stated in those cases, it is also within the exception suggested, and that equity may entertain a bill to determine and enforce the rights of the parties.

The defendant's alleged estoppel cannot be sustained. If private persons can create easements by estoppel, under our statute of frauds, and our decisions, or if a license may be implied from the acquiescence of a private person, who stands by and sees, without protest, his land used for a railway, the same cannot be said of township officers, who have no authority except such as the statute gives, and if it could be, the testimony does not justify such a finding: See Goose River Bank v. Willow Lake School Township, 1 N. Dak. 26, 26 Am. St. Rep. 605, 44 N. W. 1002. We must hold that the only authority that the defendant has is traceable to the action of the board in 1902, and it must submit to a decree in accordance with the prayer of complainant's bill, unless, within thirty days after service of a copy of this opinion, it file an election to take a decree adjudging such relief, conditioned upon its failure to accept and comply with the terms imposed by the township board in said resolution or franchise. The complainant will recover costs of both courts.

Carpenter, Montgomery, Ostrander and Moore, JJ., concurred.

Railway Tracks Laid in a Public Street without authority of law constitute a public nuisance: See the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 247.

Ejectment will Lie Against a Railroad Company which has appropriated a public street without authority: See the note to *Butler v. Frontier Tel. Co.*, 116 Am. St. Rep. 585.

BAUER v. LONG.

[147 Mich. 351, 110 N. W. 1059.]

MECHANIC'S LIEN on Estate by Entireties.—A mechanic's lien cannot be created against real estate held by husband and wife as tenants by the entireties, under a building contract signed by him alone. (p. 553.)

MECHANIC'S LIEN on Estate by Entireties.—A statute providing for a lien upon a building erected on land, "to which the person contracting for such erection has no legal title," does not create a lien on a house erected upon land owned by husband and wife as tenants by the entireties, under a building contract not signed by her. (p. 553.)

John F. Henigan, for the complainant.

George H. Curtis, for the defendants.

352 GRANT, J. This is a suit in equity to establish and foreclose a mechanic's lien. The bill alleges that complainant made a contract with defendant William S. Long to erect a dwelling-house upon the land owned by the defendants William S. and Ella Long, who are husband and wife, as tenants by the entirety; that the contract price was two thousand nine hundred and fifty-three dollars, that the contract has been performed, and that two hundred and ninety-six dollars and forty-eight cents remains unpaid. The bill also sets forth that he had taken the proceedings required by the statute to establish the lien. The bill prays for a lien upon the premises for the amount due under the contract. To this bill the defendants demurred, because (1) the bill shows that the title to the land was held by the defendants Long as tenants by the entirety; (2) that the defendant Ella did not join in the contract; and (3) that the property is a homestead, occupied and used as such. The court overruled the demurrer, and the case is before us on appeal.

The main question presented is, Does the statute provide for a mechanic's lien upon land owned by the husband and wife as tenants by the entirety under a contract signed only by the husband? Section 10,710 of 3 Compiled Laws, being section 1 of the mechanic's lien law, provides for mechanics' liens. It contemplates a lien where the land is owned by the party for whom the work is done, or the materials are ³⁵³ furnished. Section 10,711 of 3 Compiled Laws, being section 2 of the mechanic's lien law, provides for such a lien upon land owned jointly by husband and wife, provided both sign the contract. Mechanics' liens are pure creatures of the statute. Courts cannot extend them to cover cases not included in the statute. The bill shows that complainant knew how the title was held; that the building was to be so constructed that it became a part of the realty, and could not be removed after its erection without injury to the freehold, and that he has so constructed it. His bill is framed upon that theory, for it does not pray for a lien upon the building separate and apart from the land on which it is situated. This court has repeatedly held that one tenant by the entirety has no interest separable from that of the other. He has nothing to convey or mortgage or to which he can attach a lien: *Michigan Beef etc. Co. v. Coll*, 116 Mich. 261, 74 N. W. 475, and authorities there cited.

In view of this condition of the law, and to protect the rights of each, the legislature enacted that this lien might attach if the lienor secured the written contract of the husband and wife. To hold that either might contract for a lien without the assent of the other would be clear judicial legislation. The complainant seems to concede that he has no lien upon the land, but claims the right to a lien upon the dwelling-house, and to sell and remove it under his lien proceeding. This case does not fall within section 10,712 of 3 Compiled Laws, providing for a lien upon the building if the building is upon lands "to which the person contracting for such erection has no legal title," or within the decision of *Holliday v. Mathewson*, 146 Mich. 336, 109 N. W. 669. In that case the house was erected upon land to which the defendants at the time of its erection held no title. It is conceded that this question is before the court for the first time. We are cited to no authorities in point. My examination has resulted in finding one case, which holds that the lien attaches to the life estate of the husband: ³⁵⁴ *Washburn v. Burns*, 34 N. J. L. 18. The court there held that the husband during his life was entitled to the

possession and use of the lands, and that he could attach a lien to his life interest, but no other. That case is inconsistent with the holdings of this court.

The decree must be reversed, and the bill dismissed, with the costs of both courts.

McAlvay, C. J., and Blair, Montgomery, and Ostrander, JJ., concurred.

The Question Whether an Estate by the Entireties is subject to a mechanic's lien when the husband procures a building to be erected thereon is discussed in the note to Rust-Owen Lumber Co. v. Holt. 83 Am. St. Rep. 519. Land held by husband and wife as tenants by the entireties is not liable to be sold on execution to satisfy a judgment against him alone: Mercer v. Coomler, 32 Ind. 533, 102 Am. St. Rep. 252; and a municipal lien filed against her alone is, as against him, a nullity: Alles v. Lyon, 216 Pa. 604, 116 Am. St. Rep. 791. As to the right of the husband to alienate the property, see Bynum v. Wicker, 141 N. C. 95, 115 Am. St. Rep. 675.

PHILIP v. HERATY.

[147 Mich. 473, 111 N. W. 93.]

WRONGFUL DEATH—Retrospective Statute.—A statute giving a right of action for wrongful death to a person who in good faith sustained the marriage relation to the decedent, when there existed a legal impediment to their marriage, is unconstitutional in so far as it authorizes a woman to maintain an action for the death of a man which occurred prior to the enactment of the statute. (pp. 556, 557.)

T. A. E. & J. C. Weadock and L. J. Weadock, for the appellants.

F. L. Edinborough and De Vere Hall, for the appellee.

473 MONTGOMERY, J. This action was brought to recover damages for the negligent act of defendants causing the death of George Philip, plaintiff's intestate. The plaintiff claimed to be the lawful widow of George Philip and was appointed administratrix. The case was once considered by us: See 135 Mich. 446, 97 N. W. 693, 100 N. W. 1086. It was there held that it was open to defendants to prove, on the trial of this action, that plaintiff was not in fact the lawful wife of George Philip at the date of his death. That the statute (3 Comp. Laws, sec. 10,428) limits the recovery **474** of

damages to the pecuniary injury suffered by persons entitled to distributive shares in the estate of the deceased; and that, if plaintiff was not in fact the widow of George Philip, she was not entitled to recover damages. After the decision by this court, and in June, 1905, Act No. 280, Public Acts of 1905, was enacted. Section 1 reads as follows: "In any action tried for damages heretofore or hereafter sustained by either party to a marriage relation, or the issue thereof, arising from the negligent act or omission of another, causing death or injury, it shall be no bar to such action that legal impediment existed to the lawful marriage of either such party at the time the marriage relation was assumed, but a right of action shall exist in favor of such issue and the party to such relation entering the same in good faith and such issue and party shall be entitled to the same damages as though such impediment had not existed."

The case has been retried, and plaintiff has again recovered judgment. Defendants bring error.

Obviously, the question of first importance in the case relates to the validity of the act in question, as it affects the present case; for, if the defendants' contention prevails, the objection goes to the whole case. There can be no doubt that the statute of 1905 is broad enough in its terms to cover the present case. Defendants' counsel contend, however, that this statute is unconstitutional, for the reason that it constitutes an attempt to create a cause of action where none before existed.

Plaintiff's counsel contend, on the other hand, that the statute in question relates to the remedy, and that it is entirely competent for the legislature to alter, enlarge, modify, or confer a remedy for existing legal rights, and also that the legislature may establish new rules of evidence to be applied in the trial of existing causes of action. We think both contentions well supported: *Judd v. Judd*, 125 Mich. 228, 84 N. W. 134; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120. So, too, the legislature may enact a statute which shall, acting retrospectively, cure informalities in ⁴⁷⁵the execution of a contract, and shall effectuate the intent and purpose of the two contracting parties: *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Wistar v. Foster*, 46 Minn. 484, 24 Am. St. Rep. 241, 49 N. W. 247; *Mechanics' etc. Sav. Bank v. Allen*, 28 Conn. 97. It is also held by the supreme court of the United States that a statute reviving a cause of action barred by an existing statute of limitations is valid: *Campbell v. Holt*,

115 U. S. 620, 29 L. ed. 483. The decision in this case was by a divided court and is not accepted in all jurisdictions: See *Danforth v. Groton Water Co.*, 178 Mass. 472, 86 Am. St. Rep. 49, 59 N. E. 1033; 6 Am. & Eng. Ency. of Law, 2d ed., p. 946. It is also held that, where the property of another has been enhanced by an adverse claimant in possession, a statute having retroactive effect may provide compensation for betterments: *Lay v. Sheppard*, 112 Ga. 111, 37 S. E. 132.

It is doubtless true that some courts have gone to still greater length, and have, as stated by Chief Justice Holmes, in *Danforth v. Groton Water Co.*, 178 Mass. 472, 86 Am. St. Rep. 49, 59 N. E. 1033, "recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small."

The same learned justice further says: "In some such cases there has been at an earlier time an enforceable obligation, in others there never has been one; but in both classes the courts have laid hold of a distinction between the remedy and the substantive right, or have said that a party has no vested right in a defense based upon an informality not affecting his substantial equities, or that there is no such thing as a vested right to do wrong."

The courts have not avowed a purpose to hold that the legislature may create a cause of action where none before existed. This power has been denied: 8 Cyc. 910; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *City of Grand Rapids v. Lake Shore etc. Ry. Co.*, 130 Mich. 238, 97 Am. St. Rep. 473, 89 N. W. 932.

Dealing with the question in the abstract, it is difficult to find plausible reasons for sustaining the power of the ⁴⁷⁶ legislature to create a new cause of action out of a past transaction. It is clear that an attempt to enforce a penalty for an act previously committed would be within the mischief provided against by the constitutional provision inhibiting ex post facto laws: *Cooley on Constitutional Limitations*, 7th ed., p. 375. Did the statute of 1905 create a new cause of action? By our former decision it was determined that, if George Philip had a lawful wife living when he was married to the plaintiff, no right of action existed in favor of the latter. The act in question in effect says that from and after its passage a cause of action shall exist if the jury find plaintiff was

acting in good faith. When it is considered that the right of action depended upon two concurring facts, death of the intestate by defendants' wrongful act, and damages to a lawful spouse of decedent, one of which facts was obviously wanting when the act was committed, it is manifest that a statute dispensing with the necessity of proof of that fact is an attempt to create a cause of action when none existed before. We think this statute cannot be sustained in so far as it applies to this case.

Judgment reversed.

Carpenter, Ostrander, Hooker and Moore, JJ., concurred.

Actions for the Death of human beings are discussed in the note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 669.

The Legislature may Call a Liability into Being where there was none before, if the circumstances are such as to appeal with some strength to the prevailing views of justice, and if the obstacles in the way of the creation seem small: *Danforth v. Groton Water Co.*, 178 Mass. 472, 86 Am. St. Rep. 495; *Matter of Borup*, 182 N. Y. 222, 108 Am. St. Rep. 796. See, too, *Tenement House Department v. Moeschen*, 179 N. Y. 325, 103 Am. St. Rep. 910; *West v. Topeka Bank*, 66 Kan. 524, 97 Am. St. Rep. 385. But the legislature has no power to give new life to a cause of action which has been finally adjudicated by a court of competent jurisdiction: *McManus v. Hornaday*, 124 Iowa, 267, 104 Am. St. Rep. 316.

HARDY v. ALLEGAN COUNTY JUDGE.

[147 Mich. 594, 111 N. W. 166.]

INJUNCTION Against Breach of Mortgage.—A mortgagee is not entitled to an injunction against the sale on the mortgaged premises of beer not manufactured by him, such sale being contrary to the terms of the mortgage, but not impairing his security. (p. 559.)

Grove & McDonald, for the relator.

Wilkes & Stone, and Bundy, Travis & Merrick, for the respondent.

594 **CARPENTER, J.** In April, 1906, relator purchased from Mary Carmody certain hotel property situated in the village of Wayland, Allegan county. Upon this hotel there was then, and is now, a mortgage given by said Mary 595 Carmody, as mortgagor, to the Joseph Schlitz Brewing Company, as mortgagee. The mortgage secured the payment

of four thousand dollars loaned by said mortgagee to said mortgagor, and also the performance of a certain contract (signed by the mortgagor and mortgagee) containing this stipulation: "A saloon or licensed place for the sale of beer shall be continuously conducted on said premises, in which the beer of the Schlitz Brewing Company shall be exclusively sold, and that during said period (a period of five years from January 1, 1903) no other beer shall be sold or handled or in any manner dealt in on said premises."

Relator, after his purchase, refused to purchase and handle beer of the Schlitz Brewing Company, but bought it elsewhere. Thereupon said Schlitz Brewing Company filed a bill and obtained an injunction enjoining the relator from selling other beer on his premises. Relator asks a mandamus compelling respondent, the circuit judge who issued said injunction, to vacate his order granting the same.

In my judgment the agreement respecting the sale of beer secured by the mortgage is one which equity will not enforce, for the very simple reason that the remedy at law for damages is entirely adequate. All that complainant is entitled to is the profits of which he is deprived by the breach of his contract, and this he can recover in an action at law. The circumstance that the performance of the stipulation is secured by a mortgage may give the brewing company a lien for its damages, and may, perhaps, enable those damages to be determined upon the foreclosure of the mortgage; but it does not entitle the brewing company to enforce that stipulation by an injunction. A stipulation not in its nature enforceable by injunction is not so enforceable because its performance is secured by a mortgage. A mortgagee under our law has only a lien upon the mortgaged land to secure his indebtedness. He has no grievance from anything that is done on that land which does not impair its value as such security. ⁵⁰⁶ Until he has obtained title by a foreclosure, he cannot, even by stipulation in the mortgage, interfere with the mortgagor's right of possession: *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74. I think it clear that equity will not at his instance enjoin any act of the mortgagor which does not lessen the value of his security. Conformity to the stipulation in question will not improve the security of the mortgagee, and a breach of it will not impair the value of that security. In other words, that stipulation has no relation to the mortgagee's interest in the land. I am unable to see, then, why the law laid down in this case

will not apply to all similar stipulations, though not secured by a mortgage. If an injunction is issued to prevent a breach of this agreement, I do not know how it can be refused to prevent the breach of all similar agreements. In that case, whenever a business man agreed to sell in his place of business the products of a certain dealer, and to refuse to sell any other, the court would enjoin a breach of the last-mentioned agreement. This would, in my judgment, be opposed to both reason and authority.

In *James T. Hair Co. v. Huckins*, 56 Fed. 366, 5 C. C. A. 522, it was held, as stated in the headnote of the case: "An injunction will not be granted to restrain the breach of a contract whereby defendant agreed that for the term of five years he would use plaintiff's hotel registers in his business, and no others, for plaintiff has an adequate remedy at law."

So, in *Steinau v. Gas Co.*, 48 Ohio St. 324, 27 N. E. 545, where defendant had contracted to use plaintiff's gas upon his premises, and not to use electric lights or oils, an injunction against the use of electric lights in violation of the contract was denied. These cases are referred to with approbation in 2 *High on Injunctions*, 4th ed., sec. 1107. See, also, *Tawas etc. R. Co. v. Iosco Circuit Judge*, 44 Mich. 479, 7 N. W. 65. I think, too, we may profitably consider the consequences, if courts enjoin the breach of such contracts. If the court enforce by injunction the agreement of an owner ⁵⁹⁷ of property that there shall not be sold thereon the products of any rival of a certain manufacturer or dealer, it thereby stamps what is equivalent to a trust upon that property, and gives manufacturers and dealers a power to place fetters on individual and industrial freedom which self-interest will impel them to use for their own aggrandizement. The protection of their own interest does not require that they should possess any such extraordinary power, for their remedy at law for damages is entirely adequate. I think reason and authority and the best interests of society require us to say that they must be content with that remedy.

The cases of *Catt v. Tourle*, L. R. 4 Ch. App. 654, *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305, *John Brothers Abergarw Brewery Co. v. Holmes*, [1900] L. R. 1 Ch. D. 188, are relied upon by respondent as opposed to the conclusion reached in this opinion. There is nothing in *John Brothers Abergarw Brewery Co. v. Holmes*, [1900] L. R. 1 Ch. D. 188, requiring consideration; for there the court did not or-

der the issuance of an injunction. In the other cases the courts did enforce by injunction a restrictive covenant similar to the stipulation in question. There is, however, this difference: that in each of these cases the restrictive covenant was inserted in a conveyance by the owner of the property. I doubt, however, if this difference distinguishes those cases from the case at bar; for there the injunction seems to have been sought and granted for no other purpose than to insure to a brewer the profits from the sale of his beer. As authorities denying the proposition asserted in this opinion, viz., that the remedy for damages at law was entirely adequate, these cases are most unsatisfactory. That question does not seem to have been discussed at all in *Catt v. Tourle*, L. R. 4 Ch. App. 654. All that is said upon that subject, is this: "It has been said that, even if the plaintiff has any right, he ought to be left to assert that right in a court of law."

In *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305, the question did receive ⁵⁹⁸ consideration, and the right to the remedy by injunction was upheld upon these two grounds: (1) "It is a settled rule that provisions in a lease by which the lessee agrees that he will not use the leased premises for certain purposes, or carry on any kind of business therein except the kind named, may be enforced by injunction."

This rule, which is founded upon the owner's right to determine how his land shall be used, has no application to this case, nor to that case; for in that case a brewing company, not a party to the lease, was attempting to enforce the covenant. (2) "Moreover it is a general rule that where one has made a valid contract that he will not engage in a certain business or occupation, and it is shown that said contract is being violated to the injury of one entitled to enforce the same, he is entitled to an injunction against the offending party."

Such covenants are enforced by injunction, because their breach tends to the destruction of a business, and the remedy at law for damages is therefore inadequate. That reasoning does not apply where the damages are the profits of the beer sold on certain premises.

My confidence in this opinion is, therefore, not shaken by the authorities cited by respondent. Neither is that confidence shaken by the circumstance—not heretofore alluded to—that at law the brewing company has no remedy against relator. If that circumstance has any bearing, it only in-

creases my confidence in this opinion; for those cases are anomalous in which equity will enforce a contract against a person not liable therefor in a court of law. And in this connection it is important to note that the brewing company is attempting to enforce this contract against relator personally. It is not simply undertaking—and this, perhaps, it has a right to do—to charge his property as security for the performance of this contract. The contract involved in this case was, in my judgment, only a personal contract between the brewing ⁵⁰⁰ company and Mary Carmody, though, as heretofore observed, the damages resulting from a breach thereof may be a lien secured by a mortgage upon property now owned by relator and enforceable upon the foreclosure of said mortgage.

In my judgment the mandamus prayed for should issue.

McAlvay, C. J., and Grant, Blair, Ostrander, Hooker and Moore, JJ., concurred.

Montgomery, J., took no part.

The Right of a Mortgagee to an Injunction to protect his security is discussed in the note to *Webber v. Ramsey*, 43 Am. St. Rep. 432.

IN RE MERRIAM'S ESTATE.

[147 Mich. 630, 111 N. W. 196.]

SUCCESSION TAX—Nonresident Mortgagee.—A debt secured by mortgage on real estate situated in Michigan is subject to the succession tax of that state, although the mortgagee was a resident of New Jersey and up to the time of his death had the note and mortgage in his possession there. (p. 563.)

John E. Bird, attorney general, and Thomas A. Lawler and J. S. Kennary, assistant attorneys general, for the appellant.

Francis J. Swayze and Barbour & Field, for the appellee.

⁶³⁰ HOOKER, J. Henry W. Merriam, a resident of New Jersey, died possessed of a promissory note for ten thousand dollars, secured by a mortgage upon real estate in Detroit. Both note and mortgage were in his possession in New Jersey up to the time of his death. It is claimed that upon his death

the title to this note and mortgage passed to his heirs by inheritance under and by virtue of the laws of New Jersey. The auditor general asserted a claim on behalf of this state under the inheritance tax law, upon the theory that this transfer was subject to the inheritance ⁶³¹ tax law of Michigan. The decision of the circuit court was adverse, and the auditor general appealed.

The learned circuit judge filed an opinion in which he held that the right of the heir to the note and mortgage does not rest on the law of Michigan, but that it was dependent upon the law of New Jersey, and that the succession tax was not designed to apply to a case where the inheritance depended on the law of another state.

In *re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122, unqualifiedly holds that an inheritance tax may be levied in this state upon notes and mortgages of, and contracts relating to, land in this state, owned by a resident of another state, but which notes and mortgages have always been kept in Michigan for the purpose of collection and reinvestment, though they might have been temporarily taken to New York. This seems to have been predicated upon the theory that the state where such property has a situs may control the right of succession and practically does so, so that the transfer depends upon its laws. It is a complete answer to the reason given by the circuit judge, if it is sound.

This has the sanction of the federal supreme court: *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439, which applies the doctrine to a bank deposit, which it is perhaps unnecessary to say established the relation of debtor and creditor. The case does not seem to turn upon the situs of the evidence of indebtedness. We are not called upon to consider so extreme a case, for in the case before us the situs of the evidence of indebtedness, i. e., the record of the mortgage, and the land was in Michigan, as it was also in the *Stanton* case (142 Mich. 491, 105 N. W. 1122).

It is contended that we copied this law from the New York statute, and that we therefore took it with the construction that had theretofore been given it, and that construction was in accord with the claim of the heir. The case, *Matter of Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632, 34 N. E. 707, 34 L. R. A. 238, held that bonds of and certificates of stock in a New York corporation, owned by, and in the possession of, a non-resident, ⁶³² at his domicile out of the state, at the time of his

death, were not subject to taxation, under the transfer tax law, and it was followed in *Matter of Preston*, 75 App. Div. (N. Y.) 250, 78 N. Y. Supp. 91, which involved bonds which were secured by mortgages on lands in New York, said bonds and mortgages being at the domicile of the owner at the time of her death. It is possible that the case of *Bronson* (150 N. Y. 1, 55 Am. St. Rep. 632, 34 N. E. 707, 34 L. R. A. 238) may conclude us, when such a case arises, but the case now before us differs in two particulars: 1. There was a credit secured by mortgage on lands in this state; 2. The evidence of indebtedness had a situs here. The *Preston* case is not an adjudication of a court of last resort. We think the case is ruled by the case of *Stanton* (142 Mich. 491, 105 N. W. 1122). See, also, *Common Council of Detroit v. Board of Assessors of Detroit*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

The order is reversed, and the cause will be remanded to the circuit court, with directions to certify the same to the probate court, with directions to proceed to impose the tax. The appellant will recover a judgment here for costs of both courts.

Blair, Montgomery, Ostrander and Moore, JJ., concurred.

The Situs of Property for the purpose of imposing succession taxes is discussed in the note to *State v. Hamlin*, 41 Am. St. Rep. 583. It has been decided that stocks and bonds of foreign corporations, including bonds secured by mortgage, situated in one state, but owned by a resident of another state, are subject, upon his death, to the payment of an inheritance tax imposed by the law of his domicile: *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475. See, too, *Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640.

EWING v. LAMPHERE.

[147 Mich. 659, 111 N. W. 187.]

PROBATE ORDERS—Relief in Equity from Fraud.—Equity has jurisdiction to set aside the orders of a probate court procured through the fraudulent suppression of the decedent's bill. (p. 566.)

PROBATE ORDERS—Suit in Equity to Vacate.—The Verification of a Bill to set aside an order of a probate court by a less number than all of the complainants is sufficient. (p. 567.)

PROBATE ORDERS—Laches in Seeking Equitable Relief.—Where heirs procure an order of distribution by a fraudulent suppression of the decedent's will, and the legatees on discovering the

will immediately petition for its probate, a suit in equity, commenced four years later while the probate proceedings are still pending, to vacate the order of distribution and protect the funds of the estate, is not barred by laches. (p. 567.)

PROBATE ORDERS—Relief in Equity—Situs of Land.—A suit in equity to set aside an order of distribution, protect the funds of the estate, and declare the persons holding it trustees, seeks relief against persons, not property, and hence the jurisdiction of the court is not affected by the fact that a part of the estate is outside the state. (p. 567.)

Maybury, Lucking, Emmons & Helfman, for the complainants.

Bowen, Douglas, Whiting & Murfin, for the defendants,

600 HOOKER, J. The bill of complaint avers: 1. That A. P. McIntyre died a resident of Wayne county, Michigan, on May 13, 1900, leaving approximately one hundred thousand dollars of personal property, and thirty thousand dollars in real estate. His heirs at law were two brothers, Franklin and Delos, both residents of New York, and a niece, Helen S. Lamphere, of Vassar, Michigan.

2. Proceedings were had in Wayne county probate court to administer the estate, final account was rendered July 2, 1901, and an order of distribution of the residue of the estate was made on July 2, 1901, and the heirs had previously, and on May 16, 1901, partitioned the real estate among themselves by mutual deeds.

3. That A. P. McIntyre had been a widower for many years, and that he had left a will, by which the brothers were disinherited, provision was made for the niece mentioned, 601 and the larger portion of his property was left to the complainants. They are Augusta Ewing, Emma DuBois, and Susan Stringer, nieces of the alleged testator's wife, Almond Harris, a nephew of said wife, Bessie Russell, Alice Burton, and Archibald Kenyon, daughters and son of one Eva D. Kenyon. It does not appear what, if any, relation they sustained to the testator.

4. That the defendants, or some of them, or their agents, wrongfully destroyed, suppressed, or lost the aforesaid will, and the proceedings for administration were wrongfully and collusively begun, conducted, and hurried, and the property partitioned as aforesaid, and the defendants, who are peculiarly irresponsible, are fraudulently disposing of the property.

5. That in the summer of 1901 complainants first heard

of said will, and in August, 1901, received from one who had been a housekeeper for deceased (and who was a devisee of a hotel by the terms of said will) an alleged memorandum copy or draft of said will, and upon August 24, 1901, complainant, Augusta Ewing, presented to the probate court of Wayne county, Michigan, her petition for the probate of said will, and that when this bill was filed, viz., on January 2, 1906, the same was pending and ready for hearing a third time in the circuit court for said county, said cause having previously been heard in the supreme court twice where opinions favorable to complainants had been twice filed: 133 Mich. 459, 95 N. W. 450, 141 Mich. 506, 104 N. W. 787.

6. The bill asserts that the property became trust funds in the hands of the defendants by reason of the premises, that there is danger of their being dissipated and lost to them, through the collusion and prodigality of the defendants; and its prayer is (a) that defendants be decreed to be trustees holding the moneys and property, as trust funds, for the benefit of the complainants; (b) that they be required to come to an accounting with complainants, regarding the same, and the income, profits, and proceeds; (c) that it be decreed to be still the property ⁶⁶² and assets of the estate of said McIntyre, and subject to complainants' claims; (d) that it be decreed that the defendants took, received and hold the same unlawfully and fraudulently; (e) that all of said assets, proceeds and increase be held to answer the bequests and devises of complainants when said will shall have been finally established; (f) answers from each defendant to special interrogatories set forth in the bill; (g) a temporary injunction, restraining further disposition of said property, to be made perpetual on the entry of the decree; (h) a prayer for general relief.

A demurrer to the bill was filed on behalf of four out of the ten defendants. The grounds alleged were: 1. An adequate remedy at law; 2. No cause for equitable jurisdiction; 3. Want of proper verification; 4. Laches constituting a bar; 5. Want of jurisdiction of property outside of the state.

A motion to dissolve the *ex parte* injunction was also made. Upon a hearing the demurrer was sustained, and the bill was dismissed, and by consent the further order was made continuing the preliminary injunction in force, pend-

ing the decision of the supreme court of the proposed appeal from said decree.

The complainants disavow asking that the will be established in the chancery court, and say that they seek relief against the dissipation of the estate. We have held that our probate courts have jurisdiction over the probating of lost wills: See *Ewing v. McIntyre*, 133 Mich. 459, 95 N. W. 540. In view of the pendency of the proceeding for probate and the above-mentioned disavowal, we need not now pass upon the question whether equity would in all cases, or even in a case like the present, have jurisdiction to admit the lost will to probate. Jurisdiction is invoked upon other grounds; and they are, first, that there is a necessity to protect the fund pending the proceedings in probate court; second, that a judgment fraudulently obtained be set aside, without which the fund could not well be reached.

683 That equity may assume jurisdiction in both classes of cases does not admit of doubt (see 1 High on Injunctions, 4th ed., sec. 688), and, while equity will not lightly interfere to suspend the effect of judgments, it is no uncommon thing for it to do so, to prevent the collection of a judgment obtained, upon filing a bill to vacate the judgment on the ground of fraud in procuring it: See 1 High on Injunctions, 4th ed., secs. 190 et seq., 207, 232, 233, 235. It is noticeable that section 207 indicates that a preliminary injunction issued in the case there cited: *Gainty v. Russell*, 40 Conn. 450. See, also, 1 High on Injunctions, 4th ed., secs. 3, 4, 5a, 8 (and notes 40, 42, 43), 19. The jurisdiction to set aside judgments on the ground of fraud is equally well supported: See cases cited above; 1 Story on Equity Jurisprudence, 13th ed., sec. 252; 12 Am. & Eng. Ency. of Law, 1st ed., pp. 139-142. Especially should this be true where the court which rendered the judgment is powerless to give relief: *Grady v. Hughes*, 64 Mich. 540, 31 N. W. 438, 80 Mich. 184, 44 N. W. 1050; *Corby v. Wayne Probate Judge*, 96 Mich. 11, 55 N. W. 386; *Maney v. Casserly*, 134 Mich. 252, 96 N. W. 478.

It was clearly competent, therefore, for the complainants to bring this suit to set aside the orders of the probate court in the administration proceeding, upon the ground that they were obtained by fraud, although the court should, perhaps, defer a final determination of the question until the question of the fraudulent suppression of the will, upon which it depends, shall have been tried out in probate court, on the ap-

plication to admit it to probate. As already indicated, we need not determine whether, having jurisdiction for the purposes named, it might dispose of the whole matter, thus practically probating the will and distributing the property, as it is unnecessary.

The bill is apparently filed upon the theory that the whole controversy might be settled in equity. Perhaps it might be, and possibly equity would be a better tribunal to deal with these questions than the probate court, but counsel for the complainants have proceeded in probate court, and on a former occasion in this court and ⁶⁶⁴ case have insisted that the probate court alone has jurisdiction to probate the will. Moreover, as already stated, they disavow any intention to claim that this court should deal with that question. We are of the opinion that the substance and the prayer of the bill state a case within the cognizance of a court of equity.

The grounds of demurrer are not sound.

1. There is no adequate remedy at law either to set aside the order of distribution or to protect the fund.

2. We think the verification of the bill by one or more complainants, though not by all, is sufficient.

3. There is no substance to the claim of laches.

4. The bill does not ask the court to act upon the property, either outside of or within the state, but upon the parties.

Whether the preliminary injunction should be dissolved on the coming in of the answer is not a question for us to decide. It is within the discretion of the circuit judge.

The decree is reversed, and the demurrer is overruled. The usual order giving defendants time to plead may be taken. Complainants will take costs of this court.

McAlvay, C. J., and Carpenter, Ostrander and Moore, JJ., concurred.

Relief in Equity from Orders and Decrees of Probate Courts is the subject of a note to *Froebrich v. Lane*, 106 Am. St. Rep. 639. For recent cases recognizing the jurisdiction of courts of equity to grant such relief, see *Nelson v. Cowling*, 77 Ark. 351, 113 Am. St. Rep. 155; *Wallace v. Swepston*, 74 Ark. 520, 109 Am. St. Rep. 94; *Willis v. Rice*, 141 Ala. 168, 109 Am. St. Rep. 26.

CHASE v. ANGELL.

[148 Mich. 1, 108 N. W. 1105.]

PARTNERSHIP IN LANDS—Part Performance—Land as Assets—Statute of Frauds.—If a parol partnership to plat, improve, and sell lots from a tract of land owned by one of the partners has been partly performed by entering upon the business of the partnership, each partner doing work, putting in funds, and incurring joint indebtedness in the firm name while improving the premises, the statute of frauds is not an insuperable objection to treating the lands as a part of the assets of the partnership. (p. 571.)

PARTNERSHIP IN LANDS—Accounting.—If, upon an accounting between partners in a land partnership, it appears that they orally agreed that a certain lot might be withdrawn from the partnership control upon fair terms, never in fact agreed upon, equity requires that the arrangement be carried out, upon a reasonable division of values, as they then existed. (p. 572.)

PARTNERSHIP IN LANDS—Dower Right.—If, prior to the time that the parties to a parol partnership to plat and sell land owned by one of them entered upon the performance of the agreement, necessary to take it out of the statute of frauds, the partner owning the land acquired a domicile within the state, his wife has an inchoate right of dower in the lands. (p. 572.)

DOWER.—A Husband cannot, by any act of his, prejudice his wife's right of dower. (p. 572.)

PARTNERSHIP—Lands as Assets.—Land owned by copartners as part of the firm's assets, where each has a legal title, is held in common, subject to a liability to have it applied to partnership obligations and accounting, each having a lien on the interest of his copartner for any balance due him. (p. 573.)

PARTNERSHIP—Dissolution—Lands—Partition.—If a partnership is dissolved, or can no longer continue business, real estate constituting part of its assets may be divided by compulsory partition, if it be shown that it will not be required to satisfy liabilities of the firm. (p. 573.)

PARTNERSHIP—Lands as Trust.—A partner holding the legal title to land constituting part of the assets of the firm holds it in trust, for the uses thereof, its creditors, and his copartner, and equity will compel such conveyance as the necessities of the business and the rights of the copartner require. (p. 573.)

PARTNERSHIP—Lands—Dower—Dissolution.—If, on the dissolution of a partnership, it appears that land constituting part of the firm's assets is subject to a prior right of dower in the wife of the partner holding the legal title, the court in partition proceedings will determine the value of the dower interest, and pay or secure it to the person entitled to it. (p. 574.)

PARTITION.—Equity has Jurisdiction to partition equitable, as well as legal, estates. (p. 574.)

Lyon & Moinet and W. A. Fraser, for the complainant.

J. G. Kress and K. S. Searl, for the defendants.

3 HOOKER, J. The bill in this cause was filed to obtain the dissolution of a copartnership and an accounting. Both parties have appealed. The learned circuit judge who heard the cause heard proofs in open court, upon the subject of the existence of the copartnership, and rendered an interlocutory decree, determining that the relation existed, and referred the cause to a commissioner to take proofs and make a report upon the account. The report being filed, exceptions were taken by both parties, and, upon a final hearing, a decree was made settling the account and directing a sale of the copartnership property.

4 Before stating the questions that we are called upon to decide, a brief outline of facts will be made. The defendant Angell, while a resident of Seville, in Gratiot county, Michigan, concluded to rent his farm, and take his family to the state of New York, which he did. Subsequently he purchased a parcel of land near the agricultural college, at Lansing, Michigan, with the design of platting and putting it upon the market. He negotiated with the complainant with a view to forming a copartnership in this venture, and the complainant came to Lansing and engaged with him in carrying out the project. The business was done in the name of Angell & Chase. A disagreement finally resulted in the filing of the bill.

The questions discussed are the following:

1. Must the question of the existence of the copartnership relation be considered settled by the interlocutory decree, no appeal being taken therefrom, within the statutory period computed from the time of its entry?

2. If not conclusive, was there a copartnership?

3. If the parties were copartners, was any of the land included in the partnership assets?

4. If so, was lot 80 included, and if not, upon what basis should it be excluded?

5. Has Clara E. Angell an inchoate right of dower in the premises, as against the complainant? This is alleged to turn upon the place of residence of the defendants, at the time the copartnership relation is said to have been formed, which is in dispute.

6. Whether a modification of the provisions for the sale of the property should be made.

7. The allowance of eighteen hundred dollars to the complainant for personal services is questioned.

8. The right of defendant Horace Angell to the allowance of certain items relative to changes in a septic tank and sewer.

9. Certain items of account which need not be here specified.

10. Additional solicitor's fees to complainant.

In discussing these various questions the testimony will be referred to, so far as deemed necessary to make clear the facts found, upon which legal conclusions are based.

⁵ 1. The Interlocutory Decree: The interlocutory decree, after reciting that the cause had been heard and argued, contains the following: "And it appearing to the court that a partnership existed since July 1, 1901, and exists between Charles H. Chase and Horace B. Angell, and that an accounting ought to be had," and decreed a reference to a commissioner to take an account and report, "reserving to the court the right to declare the particular rights of the parties in said partnership until the making and entry of the final decree in said cause." The complainant asserts that the first decree, although in some respects interlocutory, is final upon the question of copartnership. As we have found that the proof sustains the claim of copartnership, it is unnecessary to consider that question.

2. The Copartnership: In the brief statement made we have not attempted to discuss the testimony, or indicated our conclusions upon disputed questions. The first important inquiry is whether a copartnership ever existed, defendant's claim being that what passed in relation thereto amounted to no more than an agreement that the parties should at some future time enter into a copartnership, the terms of which were never settled. Angell purchased the premises on a contract May 2, 1901. He obtained his deed May 10th, and recorded it May 14th, of the same year. Prior to July 12, 1902, Chase lived in Ithaca, Michigan, where he owned and published a newspaper.

In May or June, 1901, Angell, who had known Chase from boyhood, called upon him and told him of his investment, that it was near the agricultural college, and that he contemplated platting the property, and improving it with a view to the sale of lots. Early in June they had another talk and a proposal of copartnership was made. Subsequently they met at Lansing, and talked the matter over, and there is evidence that the terms of a copartnership were agreed upon. This was disputed by the defendant, but the circuit judge was convinced of its ⁶ truth, and we are of the same opinion.

He fixed the date of the agreement as July 1, 1901. From that time conferences were frequent, and correspondence voluminous in regard to the project. Some time was spent over the question of sewers for the territory. Complainant visited Lansing several times in relation to the work of platting the premises, and went to Detroit in the effort to negotiate a copartnership loan on the premises. He moved upon the premises, and began work in clearing them up, and in building a store, icehouse, and other buildings at joint expense. They made a lease of the store in the name of Angell & Chase, and did many other things for the common interest, among which were their dealings and loans made at the City National Bank at Lansing under the same name. They filed a bill as copartners in relation to a controversy with the college authorities, and this bill alleged that they were copartners. We need not further quote the evidence which leads to the conclusion stated. In short, we are of the opinion that the parties not only agreed that they would go into partnership upon equal terms, but that they actually entered upon the business of the copartnership, each doing work, putting in funds, improving the premises, and incurring joint indebtedness in the firm name. That they understood that they were copartners in a general way is not inconsistent with an intention to put their arrangement in writing, with such modifications as they should afterward agree upon, and, like any other partially performed oral contract for the sale of lands, the statute of frauds is not an insuperable objection to treating the lands as part of the assets, under such circumstances as have been shown in this cause.

3. Lot 80: Among the lots platted was a tract of fifteen acres or so, called "Lot 80," and at one time Mr. Angell expressed a desire to withhold that from copartnership control. Mr. Chase replied that he thought that could be arranged, but the terms were never agreed upon. While this is true, it is obvious that the complainant consented to ⁷ its withdrawal, upon fair terms, and while these were never agreed upon, equity requires that the arrangement be carried out, upon a reasonable division of values, as they then existed. From our examination of the testimony we conclude this to have been of more than the average value per acre of the lands, and we are not satisfied that the decree of the circuit judge should be modified in this respect.

4. **Items of Account:** The decree as to items allowed for the team furnished by McCloskey, for time spent by complainant when upon trips, and the disallowance of defendant's claim for board furnished to complainant's wife, will be affirmed. We think that his conclusions in relation to allowance to be made for the services rendered by the respective parties is a reasonable and just one, and that it should not be disturbed. No deduction will be made from the items allowed defendant for changes in the septic tank and sewer.

5. **Dower:** We are also of the opinion that the court did not err in holding that Mrs. Angell had an inchoate right of dower in said lands, not only upon the ground which he decided it, but for the further reason that before the parties fairly entered upon the performance of the agreement, which alone could take the contract out of the statute of frauds, Angell had again taken up his residence in Michigan and reacquired a domicile here if he ever lost it. Angell's representations before the board of review cannot have the effect of an estoppel, or otherwise affect the rights of his wife, if there was anything improper in it, which may be doubtful.

6. **Homestead:** The defendant's brief makes claim for an allowance by way of homestead, it appearing that Angell and wife resided in temporary quarters upon the premises on their return from New York. The decree is silent upon the subject, leading us to infer that the question was not raised in the circuit court, but neither answer makes such a claim, and we find no proof warranting the belief that a homestead was established before the parties⁸ entered upon the performance of the copartnership agreement.

The result of the foregoing discussion is the affirmation of the decree of the circuit court in the matter of accounting. It leaves the disposition and division of the property to be determined. The learned circuit judge was of the opinion that it was not advisable to attempt a partition of the premises, and decreed that the premises be sold subject to the rights of dower in Mrs. Angell. It is contended by defendants' counsel that the interest of Mrs. Angell cannot be divested through the husband's alienation of an undivided interest in the land, and that the law does not permit of the application of the doctrine of commutation of dower in this case. It is a general rule at common law that the husband cannot, by any act of his, prejudice his wife's right of dower, and this rule has been adhered to in Michigan. In several

cases it has been held, and such is believed to be the rule generally adhered to in the United States, that land owned by copartners, as part of their firm assets, where each has a legal title, is held in common subject to a liability to have it applied to partnership obligations and accounting, each having a lien on the interest of his copartner for any balance due him, and that when the firm is dissolved, or can no longer continue business, real estate constituting part of its assets may be divided by compulsory partition, if it be shown that it will not be required to satisfy liabilities of the firm: *Roberts v. McCarty*, 9 Ind. 16, 68 Am. Dec. 604; *Danvers v. Dorrity*, 14 Abb. Pr. (N. Y.) 208; *Patterson v. Blake*, 12 Ind. 436; *Jackson v. Deese*, 35 Ga. 84.

And in *Gray v. Palmer*, 9 Cal. 616, it was held that a surviving copartner might, by one suit in equity, obtain a decree declaring realty, the title to which stood in the name of his deceased copartner, to belong to the copartnership, directing a sale of so much thereof as was necessary to pay partnership debts, and making a partition of the remainder. Upon this subject, the court say: "As between the partners, the partnership property may consist either of real or personal estate, or of both, and in each case their ultimate rights are the same. And it does not matter in whose name the real estate may be held, he is only a trustee for the partnership, and the real estate, for the purpose of disposal and distribution, is to be treated as personal estate. An exception may be stated, as where there are no partnership debts to pay, in which case the real estate should be partitioned if practicable: *Story on Partnership*, secs. 83, 92, 93. And this being the true character of partnership real estate, the surviving partner has an equitable lien upon it for his indemnity against the debts of the firm, and for the balance that may be due to him from the firm: *Collyer on Partnership*, sec. 135, and note. For the same reason, the widow and heirs have only an interest in the net partnership property after all the partnership debts are discharged."

For a general discussion of the subject, see *Freeman on Cotenancy and Partition*, section 443.

In *Tenney v. Simpson*, 37 Kan. 353, 15 Pac. 187, it was said that upon dissolution of the partnership and a full payment of its debts, the partners became tenants in common of its real estate, and the court will decree a partition.

In this case, while these parties are not technically cotenants in a legal title, in equity they are such to all intents and purposes. While the legal title is in Angell, he holds it in trust for the uses of the firm, its creditors, and his copartner, and equity will compel such conveyance as the necessities of the business, and the rights of his copartner require. We have two statutes that confer the power upon courts of justice to compel persons having dower interests to be satisfied with a provision in lieu thereof—first, 3 Compiled Laws, section 8953, which applies to proceedings instituted by widows to recover dower in lands which the husband has conveyed without his wife's concurrence, and second, 3 Compiled Laws, section 11100, which covers cases of sales under judgments or decrees for partition. It provides:

“11100. Sec. 88. In all cases of sales under judgment or decree in partition, where it shall appear that any ¹⁰ married woman has an inchoate right of dower in any of the lands divided or sold, or that any person has any vested or contingent future right or estate in such lands, it shall be the duty of the court under whose judgment or decree such sale is made, to ascertain and settle the proportional value of such inchoate, contingent, or vested right or estate, according to the principles of law applicable to annuities and survivorships, and to direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as shall be judged best to secure and protect the rights and interests of the parties.”

Were this a case where Angell had deeded a half interest in the land to Chase and Chase had filed a bill for partition, it would have been within the terms of the statute, and the court would have authority to sell the property, giving full title, and providing for Mrs. Angell's contingent interest, in one of the methods mentioned in the statute. We are of the opinion that this is none the less a case for partition, because it is based upon an equitable right which the court may compel Angell to turn into a legal title by conveyance. Equity has authority to partition equitable estates as well as legal: See 17 Am. & Eng. Ency. of Law, 1st ed., p. 684. No reason occurs to us for holding that section 11100 should not apply to a case where the bill is filed to partition equitable titles, and to compel conveyance to carry out the decree. The situation is such that a sale subject to dower rights would be likely to materially lessen the price obtainable for the land,

for, in the hands of anyone except Angell, the outstanding contingent estate would be an obstacle to the sale of lots, which would practically prevent it. This would give to Angell such an advantage at the sale as to enable him to deprive complainant of much of the profit on his venture, which should arise out of the increase in value of the property.

It is therefore, in our opinion, a proper case in which to apply this statute. The land was bought and, we assume, is still to be held, subject to purchase money, and possibly ¹¹ other mortgages, which underlie the right of dower. Mrs. Angell's right, therefore, is only in the equity of redemption, and it is upon this basis, and its value on July 1, 1901, that the compensation must be made. It follows that some method must be devised to provide for (1) the mortgage; (2) the dower interest as it shall be ascertained; (3) the payment of the debts of the copartnership; (4) the balance which shall be found between the accounts of the copartners; (5) a division of the fund or land remaining (if all is not sold) between the copartners.

We are not sure that the record contains the testimony required to make the necessary computations; certainly we can obtain little aid from the briefs as to some of them. We think, therefore, that the case should be remanded for the circuit court to consider the proofs and such other testimony as may be offered, pertinent to such questions (provided that it shall deem any further testimony necessary, and permit it to be introduced), and make such other and further decree, not inconsistent with the decree of this court, as shall be just to the parties, unless upon the settlement of a decree in this court counsel can agree upon one, which will end the litigation here with the approval of this court. The complainant is entitled to the costs of both courts against the defendant, except such as apply solely to the partition proceedings, which should be paid from the property.

The prayer for enlarged solicitor's fees will be denied.

McAlvay, C. J., and Grant, Blair and Montgomery, JJ., concurred.

Partnership Real Estate is the subject of a note to Goldthwaite v. Janney, 48 Am. St. Rep. 62. As to the application of the statute of frauds to partnership agreements respecting land, see the note to McCoy v. McCoy, 102 Am. St. Rep. 239.

Rights and Remedies of Partners upon the Dissolution of the partnership are discussed in the note to Gilmore v. Ham, 40 Am. St. Rep. 561.

ATWOOD v. SAULT STE. MARIE LIGHT, HEAT AND POWER COMPANY.

[148 Mich. 224, 111 N. W. 747.]

NAMES—Identity of Persons.—Identity of names *prima facie* establishes identity of persons. (p. 577.)

CORPORATIONS.—Service of Process upon a corporation or on its officer or agent, whose relation to the plaintiff or to the claim in suit is such as to make it to his interest to suppress the fact of service, is unauthorized. (p. 577.)

CORPORATIONS.—Service of Process upon Assigned Claim.—If suit is brought against a corporation on an assigned claim for personal services, service of process on the corporate officer who assigned the claim is unauthorized. (p. 577.)

Oren, Webster & Carleton and J. H. More, for the appellant.

M. F. McDonald and E. S. B. Sutton, for the appellee.

224 MONTGOMERY, J. This case was commenced by declaration, filed in the office of the clerk of the circuit court for Chippewa county. The declaration was in assumpsit, and counted specially upon a contract for personal services performed by John N. Goltra for the defendant corporation for a period of twenty-five months succeeding the date of the **225** contract, alleged to have been made on December 5, 1901, and alleging that there was due and owing said Goltra on account thereof the sum of eighteen hundred and seventy-five dollars. The declaration also averred that on September 11, 1905, said John N. Goltra had duly assigned said claim to the plaintiff in this case, Frank B. Atwood. The return of the sheriff shows that service was made upon the defendant company by delivering a true copy of the declaration, etc., to John N. Goltra, secretary and assistant treasurer of the defendant corporation. No appearance was entered by defendant, and judgment was entered by default in the sum of two thousand two hundred dollars. The writ of error was sued out, and the defendant assigns as error that the service was invalid, for the reason that, the claim sued upon being one assigned by John N. Goltra, service upon him was unauthorized.

The plaintiff contends that the record does not sufficiently show that the John N. Goltra who was served is the same John N. Goltra who assigned the claim sued upon. We think,

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however, that the identity is prima facie established by identity of names: 6 Ency. of Ev. 913. John N. an officer of the company upon whom service could be made under the statute. But it is established by authority for a rule so manifestly just were needed—that even though a person is within the terms of a statute, if his relation to the plaintiff or the claim in suit is such as to make it to his interest to suppress the fact of service, such service is unauthorized: *Buck v. Ashuelot Mfg. Co.*, 4 Allen (Mass.), 357; *St. Louis etc. Min. Co. v. Edwards*, 103 Ill. 472.

It is insisted, however, that, as the claim of Goltra had been assigned before service was made upon him, he was at the time of the service disinterested. There is nothing of record, except the statement that the account was assigned, to show the nature of the contract of assignment. We think that in such a case there is a prima facie presumption that there was an implied warranty that a chose in action²²⁶ which was the subject of the contract existed in fact: 2 Am. & Eng. Ency. of Law, 2d ed., p. 1090.

It follows that Goltra had an interest in the claim in suit adverse to the defendant, and that service upon him was unauthorized: See *White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679.

The judgment is reversed, with costs.

McAlvay, C. J., and Carpenter, Grant and Blair, JJ., concurred.

Service of Process on an Officer of a Corporation adversely interested is ineffective: *St. Louis etc. Min. Co. v. Edwards*, 103 Ill. 472; *St. Louis etc. Min. Co. v. Sandoval Coal etc. Co.*, 111 Ill. 32; *Buck v. Ashuelot Mfg. Co.*, 86 Mass. (4 Allen) 357; *George v. American Ginning Co.*, 46 S. C. 1, 24 S. E. 41.

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TOWNSHIP OF PORTSMOUTH v. CRANAGE STEAMSHIP COMPANY.

[148 Mich. 230, 111 N. W. 749.]

TAXATION—Situs of Property.—The property of a corporation engaged in maritime commerce or navigation is taxable at the place where its general business office is located, and not at the place named in its articles of incorporation as the location of its general office for business, when it has no property at the latter place. (p. 578.)

TAXATION—Estoppel.—The act of a navigation company, in listing its property for taxation in a township in which it is not legally taxable does not estop it from contesting the validity of the tax, when everybody concerned acted upon the erroneous assumption that a statute which had already been declared unconstitutional was constitutional. (p. 579.)

TAXATION—Estoppel to Contest.—A corporation is not estopped to contest the validity of a tax on its property, on the ground that it failed to appear before the board of review and contest the assessment. (p. 580.)

Cooley & Hewitt, for the appellant.

Gillett & Clark, for the appellees.

230 CARPENTER, J. A suit to recover taxes assessed for the year 1905 was brought by said plaintiff against each of the above-named defendants. The facts in each case being the same, the two suits were consolidated. They **231** were tried before the court without a jury. A finding of facts was made, and judgment rendered in favor of defendants. The proceedings are brought before this court for review by a case made after judgment. The defendants are corporations engaged in maritime commerce or navigation. Their articles of association name Portsmouth township as the location of their general office for business. The corporations listed their property for taxation for the year 1905 in said township. No property of said defendant corporations was in fact situated in said township, and their general business office was located in Bay City. Defendant corporations were therefore taxable, not in plaintiff's township, but in Bay City (*Teagan Transp. Co. v. Detroit Board of Assessors*, 139 Mich. 1, 111 Am. St. Rep. 391, 102 N. W. 273, 69 L. R. A. 431), and it was in fact there taxed.

Plaintiff contended in the lower court and contends in this court that the principle of estoppel applies, and obligates defendants to pay said taxes. Does that principle apply?

Plaintiff insists that it does. It insists that the tax was assessed and obligations thereby imposed on plaintiff, because defendants stated in their articles of incorporation, in their report to plaintiff's assessing officer, and verbally to said assessing officer, that their general business office was located in said plaintiff township. It is true that such statements were made, and the consequent liabilities resulted therefrom, but there is no finding of facts that plaintiff's assessing officer believed that defendants' general office for business was actually located in said township, and from the facts found no such inference can be drawn. It appears from said finding of facts that after the foregoing statements were made, plaintiff's assessing officer was in such doubt as to his duty that he "consulted the assistant prosecuting attorney, who advised him that the principal business office of such a corporation was wherever the officers swore it was located, and it is there that such corporations are liable for assessment." It is to be inferred from the finding of facts that ²³² the property was assessed in plaintiff township, not because its assessing officer believed defendants' general business office was there located, but because he believed that defendants had a right to select, and by the statements above referred to had selected, that township as the situs for the taxation of their personal property. It appears, too, from said finding that the defendants "acted in good faith, and had not at that time been advised that the excepting of navigation companies from the general provisions of section 11 of the general tax law had been held unconstitutional." (It is to be observed that what is above referred to as an exception to the tax law—declared unconstitutional in *Teagan Transp. Co. v. Detroit Board of Assessors*, 139 Mich. 1, 111 Am. St. Rep. 391, 102 N. W. 273, 69 L. R. A. 431—made the personal property of transportation companies taxable in the municipality "which is stated in their articles of association to be the location of their general office for business.") This, then, is not a case in which plaintiff's taxing officer was deceived by any statement of fact made by defendant. It is a case in which everybody concerned acted upon the erroneous assumption that the law which had already been declared unconstitutional was constitutional. It is simply a case of a mutual mistake of law. It is ruled by *Smith v. Sprague*, 119 Mich. 148, 75 Am. St. Rep. 384, 77 N. W. 689, where we held that the doctrine of estoppel did not apply: See, also, *McKeen v. Naughton*, 88

Cal. 462, 26 Pac. 354; *Brewster v. Striker*, 2 N. Y. 19; *Bigelow on Estoppel*, 572.

Plaintiff also contends that defendants are estopped because they did not appear before the board of review and contest their assessments. This contention is answered by the following decisions: *City of Detroit v. Mackinaw Transp. Co.*, 140 Mich. 174, 103 N. W. 557; *Woodmere Cemetery Assn. v. Township of Springwells*, 130 Mich. 466, 90 N. W. 277.

Judgment affirmed.

McAlvay, C. J., and Grant, Blair and Moore, JJ., concurred.

The Situs of Personal Property for the Purpose of Taxation is the subject of a note to *Buck v. Miller*, 62 Am. St. Rep. 448. The situs of vessels for the purpose of taxation is discussed in the recent case of *Olson v. San Francisco*, 148 Cal. 80, 113 Am. St. Rep. 191, and cases cited in the cross-reference note thereto. A statute which provides that the personal property of all corporations engaging in maritime commerce or navigation shall be assessed only in the city, village or township which is stated in their articles of incorporation to be the location of their general office for business, confers on such corporations the special privilege of determining the situs of their property for purposes of taxation, and violates the constitutional provision requiring a uniform rule of taxation: *Teagan Transp. Co. v. Board of Assessors*, 139 Mich. 1, 111 Am. St. Rep. 391.

WALLACE v. KELLY.

[148 Mich. 336, 111 N. W. 1049.]

EVIDENCE to Vary Written Contract.—Testimony of a verbal conversation had before the execution of a written contract is not admissible to vary its terms. (p. 582.)

STANDING TIMBER—Right of Assignee of Purchaser to Remove—Forfeiture.—If the purchaser of standing timber has been given an extended period of time in which to remove it, his assignee will not be enjoined from cutting and removing it, on the ground that the time for its removal has expired. (p. 582.)

STANDING TIMBER—Right to Remove—Forfeiture—Waiver. An owner can sell standing timber only by a conveyance in writing under the provisions of the statute, but his right to forfeit the timber sold for nonremoval within the time fixed by the contract may be waived by parol. (p. 582.)

STANDING TIMBER—Extension of Time to Remove—Forfeiture—Waiver.—An oral agreement to extend the time in which standing timber sold may be removed, in consideration that the pur-

chaser pay the taxes thereon, is a waiver of the right to forfeit the timber for nonremoval within the time fixed by the contract of sale. (p. 582.)

E. F. Sawyer, for the complainant.

F. O. Gaffney, for the defendants.

³³⁶ CARPENTER, J. December 20, 1899, complainant entered ³³⁷ into a written contract whereby, for the consideration of seven hundred and fifty dollars then paid, he sold "to the Cromwell Lumber Company the maple timber that will make logs down to eleven inches in diameter" then standing on certain described lands. It was further agreed that "all timber unsuitable for merchantable sawlogs [should] be left" and "the Cromwell Lumber Company [was] given till the spring of 1902 to remove said timber." Before that time expired complainant and said Cromwell Lumber Company orally agreed that the latter might have further time to remove said timber if it would pay the taxes thereon. In compliance with this agreement, the timber was left standing and said Cromwell Lumber Company paid said taxes during the years 1902, 1903, and 1904. In 1904 the Cromwell Lumber Company sold its interest in said standing timber to defendant, and he soon thereafter commenced cutting and removing the same. In September, 1905, complainant notified defendant to remove no more timber from said lands, and shortly thereafter he commenced this suit, seeking an injunction preventing said defendant from cutting or removing said timber. Defendant filed an answer in the nature of a cross-bill, praying for an affirmative relief. Upon the hearing testimony was taken in open court and a decree was rendered dismissing complainant's bill and giving defendant "the right to enter upon said lands and cut and remove the timber within a reasonable time." From this decree, complainant appeals.

That part of the decree dismissing complainant's bill is clearly correct, for complainant did not make a case entitling him to relief. He did not make a case, as he contends, upon the ground that he was fraudulently induced to enter into the contract of sale, because his testimony fails to prove fraud. He did not make a case upon the ground alleged in his bill, that defendant was threatening to remove timber not embraced in the contract, for the testimony proves that there was no such threat nor intent. Nor was he entitled to relief,

as he contends, upon ³³⁸ the ground that defendant was removing more timber than was specified in a verbal conversation before the written contract was made, for the testimony respecting that oral conversation was incompetent, and affords no basis whatever for relief. He was not entitled to relief upon the ground that the time to remove the timber had expired. The principle that equity will not aid to enforce forfeitures forbids: *Hodges v. Buell*, 134 Mich. 162, 95 N. W. 1078.

The serious question in the case arises from the relief granted defendant on his cross-bill. Did the oral agreement to extend the time for removing this timber operate as a waiver of complainant's right to forfeit the same? Complainant insists that it did not. He insists that, as standing timber is a part of the land and cannot be sold except by a writing signed by the owner (3 Comp. Laws, sec. 9509), the right to forfeit said timber can be waived only by a writing signed by the owner. It is undoubtedly true that one can sell standing timber only by a conveyance in writing (*Russell v. Myers*, 32 Mich. 522), but I think it also true that his right to forfeit the same for nonremoval may be legally waived by parol. This latter rule is, I think, to be deduced from *Green v. Bennett*, 23 Mich. 464. There this court held that the condition that the vendee of standing wood and timber should remove them within a stated time "Was one which the vendor might waive; and, by claiming and receiving from the purchaser the damages for the failure to remove them in time, he clearly waived the condition, and left the wood and timber as the property of the purchaser, to be removed within a reasonable time." See, also, opinion of Chief Justice Campbell in *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93.

I think, therefore, that complainant waived the right to forfeit the timber for nonremoval, and that the decree complained of was properly made. That decree is affirmed.

McAlvay, C. J., and Grant, Blair and Moore, JJ., concurred.

When a Contract is Reduced to Writing, prior negotiations are merged therein and parol evidence is ordinarily not admissible to show a separate agreement modifying the one evidenced by the writing: *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989; *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811; *Jamestown Business College Assn. v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740.

Contracts for the Sale of Growing Timber are generally regarded as within the statute of frauds, since the trees are considered a part of the realty: See *Ives v. Atlantic etc. R. R. Co.*, 142 N. C. 131, 115 Am. St. Rep. 732, and cases cited in the cross-reference note thereto.

McILHINNY v. VILLAGE OF TRENTON.

[148 Mich. 380, 111 N. W. 1083.]

MUNICIPAL CORPORATIONS—Streets—Improper Use of.—A municipal corporation has no right to erect an electric lighting plant within the limits of a public street, and such erection may be enjoined at the suit of abutting property owners. (p. 585.)

Lodge, Trevor & Brown, for the complainant.

Dickinson, Stevenson, Cullen, Warren & Butzel, C. W. Casgrain and J. S. McDowell, for the defendant.

381 **MOORE, J.** Appellant is the owner of a residence property situated on the northeast corner of Front street and St. Joseph avenue, in the village of Trenton.

The dedication clause in the plat contained the following language: "To vest the fee of such parcels of land as are herein named, or intended to be for public uses, in said county, in trust, and for the purposes and uses therein named, expressed or intended, and for no other use or purpose whatever."

Complainant is the owner of lots 97, 98, 119, 120, situated on the northeast corner of Front street and St. Joseph avenue, her property having a frontage of one hundred and thirty-two feet on Front street and running back parallel with and alongside of St. Joseph avenue to the channel bank of the Detroit river, a distance of from three hundred and fifty to five hundred feet.

On or about May 22, 1896, the village council and water commissioners caused to be erected in the center of St. Joseph avenue, east of Front street, and between one hundred and one hundred and fifty feet from the channel bank of the river, a building thirty feet wide east and west, by thirty-two feet long north and south, which has since been used for a pumping station in connection with the village waterworks. No legal proceedings were taken by complainant, or in her behalf, to restrain or enjoin the erection of this plant. Since the erec-

tion and operation of this pumping station complainant and other residents in that neighborhood claimed to have suffered great inconvenience and annoyance from the large volumes of smoke and soot emitted from its smokestack, and the noises of a large steam whistle blown each day. On the 12th of November, 1902, the defendant awarded a contract for the erection of, and afterward proceeded to erect, a frame building with a stone foundation (a duplicate ³⁸² of the then existing pumping station) in St. Joseph avenue, immediately adjoining the pumping station on the north, and between the pumping station and complainant's property. This building, when completed, was to be twelve feet high, thirty-two feet long north and south, and thirty feet east and west, parallel with complainant's lot line, and leaving between one-half to two and one-half feet between the building and the complainant's south fence. This building was to be used for the installation and operation of an electric lighting plant.

Complainant thereupon filed her bill of complaint to enjoin such proposed erection, claiming that the village had no right to use the street in such a manner, and praying that defendant be compelled to remove, not only that portion of the new structure which had already been put in, but also the pumping station.

The trial court held that, although the pumping station might have been regarded as a nuisance in its inception, and if application had been made in due season to enjoin it he would have enjoined the original erection, nevertheless the complainant, having allowed so long a time to elapse, is not entitled to an injunction entirely prohibiting the erection of the building. He ordered the smoke and noise nuisance to be abated; and while he enjoined the erection of the building next to complainant's property where it was originally proposed to build it, he permitted it to be erected on the eastern or river side of the pumping station, still occupying as great an additional part of the street as first planned.

The case is brought here by appeal. Counsel do not ask to have the decree refusing to enjoin the village from operating its pumping station reversed, but ask this court to grant an injunction against the new obstruction in the street.

The following statements of the law have been made:

“Municipal corporations, notwithstanding their broad and comprehensive powers, have no right, unless authorized by the legislature, to alienate their streets or devote ³⁸³ them to

the uses inconsistent with the rights of the general public and the abutting land owners": 24 Am. & Eng. Ency. of Law, 1st ed., p. 47, and cases cited.

"Whether the fee of the street or a mere easement is vested in the municipality, it holds it in trust for the public for the ordinary and necessary purposes to which the streets of a city are usually subjected": 27 Am. & Eng. Ency. of Law, 2d ed., p. 149, and cases cited.

"The municipality holds the streets, and power to regulate and control them, in trust for the public, and cannot put them to any use inconsistent with street purposes. . . . Thus cities have no right to use their streets for the erection of municipal buildings or works, and it has been held that placing a stand-pipe in a public street, the fee of which was in the municipality, was an unlawful use of the street": 27 Am. & Eng. Ency. of Law, 2d ed., pp. 150, 151, and cases cited.

See, also, *Barrows v. City of Sycamore*, 150 Ill. 588, 41 Am. St. Rep. 400, 37 N. E. 1096, 25 L. R. A. 535; *Davis v. City of Appleton*, 109 Wis. 580, 85 N. W. 515; *Pettit v. Town of Grand Junction*, 119 Iowa, 352, 93 N. W. 381; *Mayor etc. of Savannah v. Wilson*, 49 Ga. 476; *Rutherford v. Taylor*, 38 Mo. 315; *Glasgow v. City of St. Louis*, 87 Mo. 678.

The village had no right to make the use of the street it attempted to do. Since this bill was filed, the village has ignored the effort of complainant to assert her rights, and has completed the building, and we are now urged to affirm the decree of the court below. The action of the village was taken at its peril, and it should not be permitted to profit by its own wrong.

The decree is reversed, and one will be entered here requiring the removal of the electric lighting plant, with costs of both courts.

Grant, Blair, Montgomery and Hooker, JJ., concurred.

Public Streets are reserved for public uses and none other, and a municipality cannot authorize their obstruction for private purposes: *Tilly v. Mitchell etc. Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007; *Brauer, v. Key*, 99 Md. 367, 105 Am. St. Rep. 304; *City Council of Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147; *People v. Harris*, 203, Ill. 272, 96 Am. St. Rep. 304; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 312.

MIER v. HADDEN.

[148 Mich. 488, 111 N. W. 1040.]

VENDOR AND PURCHASER—Option to Purchase—Validity. An option for the purchase of land is not unconscionable, although it gives the purchaser the right to purchase or not at his option, with a choice of remedy by suit for specific performance or action for damages, but limits the vendor in case of failure to purchase to nominal stipulated damages. (p. 587.)

SPECIFIC PERFORMANCE OF OPTION to Sell Land.—An option contract to sell land will be specifically enforced where the option holder, relying upon the option, has found a purchaser and made a contract to convey the premises to him, and will be liable to him in damages if he fails to perform his contract. In such case an action at law for the breach of the option to sell is not an adequate remedy. (p. 588.)

SPECIFIC PERFORMANCE OF OPTIONS.—Options for the purchase of land, when based on a valid consideration, are valid and may be specifically enforced. (p. 588.)

SPECIFIC PERFORMANCE OF OPTIONS—Mutuality of Remedy.—A purchaser's right to specific performance of an option for the purchase of land is not affected by the fact that he has, and the vendor has not, a choice of an action at law, or a suit for specific performance by the express terms of the contract, and the latter's damages are stipulated, while those of the former are not. (p. 589.)

SPECIFIC PERFORMANCE OF OPTION—Offer to Perform.—A bill for the specific performance of an option to purchase land sufficiently alleges performance on the part of the option-holder, when it shows a written acceptance of the option, a demand for an abstract as provided for in the contract, a refusal by the vendor to perform, an offer to pay the price, and to bring into court the amount thereof to be paid on the delivery of a deed. (p. 590.)

OPTION TO PURCHASE LAND—Renunciation.—If a valuable consideration is paid for an option to purchase land, the vendor cannot withdraw the offer during the stipulated period of the option. (p. 591.)

M. L. Howell, for the complainants.

J. R. Carr, for the defendants.

489 HOOKER, J. The defendants have appealed from an order overruling a demurrer to a bill for specific performance of a land contract. The bill alleges that the complainants are copartners, engaged in the business of buying and selling land, and that their method is to secure options, and then seek purchasers, to whom they contract the land, afterward completing their own purchase. In June, 1906, they made an option contract with the defendants, who are and were then husband and wife, to purchase at complainants' option, to be exercised on or before November 1, 1906, at the price of eight thousand three hundred dollars, the defendants' farm. The considera-

tion paid at the time of making this agreement, which was in writing, was one dollar. A copy was attached to the bill:

490 “Option contract, between Sol. Mier Co., of Ligonier, Ind., party of the first part, and Samuel B. Hadden and Matilda A. Hadden, his wife, of Ontwa township, Cass county, Mich., party of the second part, to wit:

“In consideration of one dollar (\$1.00) paid by party of the first part to party of the second part, the receipt of which is hereby acknowledged, and in consideration of the agreements hereinafter set out, said second party hereby sells to said first party for the sum of eighty-three hundred dollars (\$8,300.00) to be paid to said second party as follows: Cash upon possession of land (less amount of liens and encumbrances on the real estate) upon execution to said first party of a warranty deed therefor the following real estate in Cass county, State of Michigan, viz.:

“Fifty-seven (57) acres off the east side of the northwest quarter ($\frac{1}{4}$) of section seven (7) south of highway and thirty-three (33) acres off the west side of the northeast quarter ($\frac{1}{4}$) south of highway in section seven (7) all in township eight (8) south of range fifteen (15) west containing ninety (90) acres more or less to be more accurate, described in deed.

“Party of the second part agrees to furnish abstract showing perfect title to said real estate, which title must be made satisfactory to said first party’s attorney, and second party agrees to convey said real estate to party of the first part by deed of general warranty. First party may demand the execution of said deed at any time within November 1, 1906, from the date hereof; and if second party fails or refuses to execute the same, or fails or refuses to perform the stipulations hereof on his part, then first party may by suit enforce the specific performance by second party of this contract, and the execution of a deed for said real estate, or may, at his option, by suit, recover from said second party, with interest and attorney’s fees and without relief, whatever damage he may have suffered by reason of any default on the part of said second party.

“First party may refuse to purchase said real estate, and, if he does so, shall forfeit and pay to second party with interest and attorney’s fees and without relief, the sum of one dollar (\$1.00) which shall constitute the only liability of first party for such refusal.

"This contract to be void unless the first party offers performance thereof on his part within said period of November 1, 1906.

⁴⁹¹ "Deed to be made and delivered at the office of Sol Mier Co., at South Bend, Ind.

"It is further agreed that the party of the second part reserve the tenant's interest the one-half ($\frac{1}{2}$) of the wheat sown in the fall of 1906.

"Possession to be given March 1, 1907.

"Executed in duplicate this 21st day of June, 1906.

"SOL. MIER CO.,

"By LEON ROSE. [Seal.]

"SAMUEL B. HADDEN. [Seal.]

"MATILDA H. HADDEN. [Seal.]"

The defendant, Samuel B. Hadden still owns the premises, and the price was a fair one. The bill alleges that the complainants relied on the option, and have found a purchaser, and made a contract to convey the premises to him, and will be liable to him in damages if they shall fail to perform their contract. They elected to purchase the land, and so notified the defendants on or about October 1, 1906, when defendants informed them that they would not perform the contract made by them. We have examined the bill in the record in the light of defendants' claim that the contract is unconscionable and are of the opinion that it is not open to that charge. We shall therefore turn our attention to the legal questions raised.

ADEQUACY OF REMEDY AT LAW.

If it were to be conceded that equity would never enforce specifically a contract for the purchase of land, where damages would afford an adequate remedy, we should, nevertheless, be justified in enforcing this, because of the contract obligations which have grown out of it. The complainants' refusal or inability to perform such contracts would be likely to subject them to damages for nonperformance, and the danger that the damages recoverable upon this contract might not equal the sum that another jury might award upon that, to say nothing of the inconvenience and expense of two lawsuits.

WANT OF MUTUALITY.

(a) Options for the purchase of land, where based on ⁴⁹² a valid consideration, are valid contracts, and may be specifically

enforced: See *Gustin v. Union School Dist.*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156.

(b) It is claimed that this contract cannot be specifically enforced, for the reason that the complainants have the right to refuse to purchase after they have accepted the option. We do not so construe the contract. This provision is essential to make the contract optional.

(c) Another obstacle to specific enforcement is said to be a want of mutuality in the right of enforcement, for the reason that the complainants have choice of action at law or specific enforcement by the express terms of the contract, while the defendants have not, and the latter's damages are stipulated, while those of the former are not. We see nothing in this that affects the question. It is a part of the provision which constitutes the option.

VALIDITY OF THE CONTRACT.

It is said that the contract is void for want of witnesses, under 3 Compiled Laws, section 9035, which provides that:

“(9035) Section 1. The people of the state of Michigan enact, That contracts for the sale of land or any interest therein, shall be executed in the presence of two witnesses, who shall subscribe their names thereto as such, and the vendor named in such contract, and executing the same may acknowledge the execution thereof before any judge, or commissioner of a court of record, or before any notary public or justice of the peace within this State; and the officer taking such acknowledgment shall endorse thereon a certificate of the acknowledgment thereof, and the date of making the same under his hand.”

This is answered by 3 Compiled Laws, section 9051:

“(9051) Sec. 4. No conveyance of land or instrument intended to operate as such conveyance, made in good faith and upon a valuable consideration, whether heretofore made or hereafter to be made, shall be wholly void by reason of any defect in any statutory requisite in the sealing, signing, attestation, acknowledgment, or certificate of acknowledgment thereof; nor shall any deed or conveyance, heretofore or hereafter to be made, designed ⁴⁹³ and intended to operate as a conveyance to any religious or benevolent society or corporation, be wholly void by reason of any mistake in the name or description of the grantee, nor because of any failure of such society or corporation to comply with any statutory provisions

concerning the reorganization of such society or corporation: Provided, Such society or corporation shall hereafter comply with the provisions of the statute touching the organization or incorporation of such societies; but the same, when not otherwise effectual to the purposes intended, may be allowed to operate as an agreement for a proper and lawful conveyance of the premises in question, and may be enforced specifically by suit in equity in any court of competent jurisdiction, subject to the rights of subsequent purchasers in good faith and for a valuable consideration; and when any such defective instrument has been or shall hereafter be recorded in the office of the register of deeds of the county in which such lands are situate, such record shall hereafter operate as legal notice of all the rights secured by such instrument."

This section was applied to a contract in the case of *Aultman, Miller & Co. v. Pettys*, 59 Mich. 486, 26 N. W. 680, where it was held that the record of a contract having only one witness was constructive notice of a contract. This necessarily implies that the contract was not void, under section 9035, for otherwise the question of notice would have been unimportant, but Mr. Justice Morse expressly said: "We think the agreement conveyed such an interest in land that it was entitled to record. It was something more than an executory contract for the sale of the land. It expressly gave the future wife such an interest, at once upon its execution and delivery, that Daniel Pettys could not sell or encumber it without being joined in the deed or mortgage by the defendant, Lucina Pettys, and it was intended to and did operate as a conveyance to her of a present interest in the premises; such an interest that, without her deed or lease, no possession could be given to anyone."

The contract there under consideration was a conditional contract to convey land: See, also, *Chicago Lumbering Co. v. Powell*, 120 Mich. 51, 78 N. W. 1022.

494 PERFORMANCE.

It is contended that the complainants have not performed the contract upon their part. They served notice in writing after having given oral notice of intention to take the land, and demanded an abstract. Defendants had previously refused to perform the contract. The bill offers to pay the price, and to bring into court the amount thereof to be

paid on delivery of a conveyance. We think this sufficient allegation of an offer to perform.

RENUNCIATION.

Counsel claim that the defendants' refusal to perform before the written demand was made was a renunciation of the contract, and effective to determine complainants' rights to require performance. If this would be so as to a gratuitous option before acceptance of the offer therein contained, it is not so in this case, where a valuable consideration was paid for the contract: See *Gustin v. Union School District*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156.

We think it unnecessary to further discuss the case.

The order is affirmed, with costs.

McAlvay, C. J., and Montgomery and Moore, JJ., concurred.

OSTRANDER, J., Concurring. I concur in affirming the decree. The written instrument in evidence is, in effect, no more than an offer, based upon a valuable consideration, to sell real estate if the offer is accepted on or before a certain date. It does not convey, or vest in the option-holder, any interest in the land: *Gustin v. Union School District*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156. If the offer was properly accepted before it was withdrawn, within the time limited, there was a completed contract which a court of equity may enforce: *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Herrman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. ed. 501; *Johnston v. Trippe*, 33 Fed. 530; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; ⁴⁹⁵ *Linn v. McLean*, 80 Ala. 360. See, also, 2 Beach on Contracts, secs. 887-924. The option does not specify the manner of acceptance, or how offer of performance shall be made. In such a case, to satisfy the statute of frauds, the election should be in writing. It is averred in the bill that a written notice that complainants had elected to purchase the land, with a demand for an abstract, was personally given to each of the land owners, previous to which time, however, upon receiving an oral statement that complainants had elected to purchase according to the option the land owners withdrew the offer. The courts are not agreed upon the prop-

osition that an offer to sell, based upon a valuable consideration, may not be withdrawn during the option period. The proposition has been stated obiter in several opinions, among which are *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94. The point was not involved in *Gustin v. Union School District*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156. It is expressly ruled in *Ross v. Parks*, 93 Ala. 153, 30 Am. St. Rep. 47, 8 South. 368, 11 L. R. A. 148, in accordance with the conclusion here reached. While it may seem at first blush a legal paradox that a contract for the sale of land, mutual and enforceable, can be made when at the time it is claimed to have been made one party to it is openly protesting that he will make no such contract, and while reasons may be advanced to support the proposition that the option-holder should be in such a case remitted to an action for damages for refusal to hold the offer open for the stipulated time, there is reason and precedent for holding that the offer to sell, if paid for, may not be withdrawn during the stipulated time, being, in law, a continuing offer to sell.

SPECIFIC PERFORMANCE OF OPTIONS.

- I. Enforcement, Generally, 592.**
- II. Mutuality, 594.**
- III. Consideration, 597.**
- IV. Compliance With Terms of Option, 597.**
- V. Option Under Lease, 598.**
- VI. Rights of Assignee, 600.**

I. Enforcement, Generally.

The authorities are very generally agreed that an optional contract to convey land founded on a proper and valuable consideration may be specifically enforced, upon an acceptance of the terms of the contract and tender of the price by the option-holder within the time specified: *Moses v. McClain*, 82 Ala. 320, 2 South. 741; *Ross v. Parks*, 93 Ala. 158, 30 Am. St. Rep. 47, 8 South. 368, 11 L. R. A. 148; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Estes v. Furlong*, 59 Ill. 298; *Donahue v. Potter and George Co.*, 63 Neb. 128, 88 N. W. 171; *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554; *Schroeder v. Gemeinder*, 10 Nev. 355; *Ken v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Clarno v. Grayson*, 30 Or. 111, 46 Pac. 426; *Conner v. Clapp*, 42 Wash. 642, 85 Pac. 342. A contract in writing under seal by which one party, in consideration of one dollar, payment of which is acknowledged, agrees to sell and convey to the other certain lands within a stipulated time upon payment within such specified time of a stated price there-

for, is valid and may be specifically enforced upon compliance with its terms by the option-holder, the very thing contracted for being the right to a specific performance at the option of the purchaser: *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972. An option contract for the purchase of real estate, if complete and certain in its terms, and based on a valuable consideration, is converted into a contract of sale which may be specifically enforced in equity by an acceptance by the vendee in accordance with the terms, and within the time specified therein. The purpose and effect of the option contract is the surrender by the vendor, for a consideration and for the time limited, of the right which he would otherwise have to withdraw the offer of sale contained therein: *Couch v. McCoy*, 138 Fed. 696. An option given for the sale of land, supported by a valuable consideration, gives the optionee the exclusive privilege of purchasing within the time limited and cannot be withdrawn during the time stipulated for, and upon acceptance within that time it becomes an executory contract for the sale of the land, which may be specifically enforced: *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A., N. S., 403. In *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195, it appeared that defendants having bid off land held in common by complainants and others, at a chancery sale for partition, and not being able to give the required security for the purchase price, agreed in writing with the complainants that in consideration of their waiver of such security, they should have the option to purchase the lands from him at any time within two years, at the amount of his bid with interest. The sale was reported and confirmed and title vested in the defendant pursuant to such agreement. Complainants, having elected within the two years to purchase the lands at the price stipulated, offered to perform such agreement, and demanded a conveyance, which was refused by the defendant. Complainants then filed a bill for specific performance, and it was held that such agreement was supported by a sufficient consideration; that it was irrevocable by the defendant, and stood open for complainant's acceptance at any time within two years, and that complainants having within that period exercised their option to take under it, and tendered performance, they were entitled to specific performance.

In *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394, it was said that: "When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property, and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed, and pay the price. Such contracts are perfectly valid, and it is now well settled that a court of equity may decree specific performance of them. . . . An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms, and it is the right to have them specifically

enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but if he cannot do this and must resort to an action for damages, his option in most cases will be of little or no value. . . . The modern and, we think, the sound doctrine is, that when such contracts are free from fraud, and are made upon a sufficient consideration, they impose upon the makers an obligation to perform them specifically which equity will enforce." And the rule is now well settled that an optional agreement to convey lands, without any corresponding obligation or covenant to purchase, will be specifically enforced in equity, if made upon a sufficient consideration: *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580.

An option for the purchase of land, though void as an option, because of an extension of time without any new consideration, is still valid as a continuing offer to sell, and if accepted before retraction, together with a tender of the purchase price, it constitutes a contract upon which specific performance may be had: *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695. Specific performance of an option to purchase land is not defeated by the fact that the option-holder, in order to raise money to pay for such land, has contracted a portion of it to third persons, who were not parties to the original agreement: *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195.

II. Mutuality.

The earlier doctrine announced in a few cases, that want of mutuality of obligation would render an optional contract incapable of specific performance, has been so modified that such agreements to convey, without any corresponding obligation or covenant to purchase, will now be specifically enforced in equity when made upon a sufficient and valuable consideration, and when there has been an acceptance of its terms by the vendee in apt time: *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555. The doctrine that there must exist, as a prerequisite to specific performance, both mutuality of obligation and of remedies, does not apply to optional contracts for the sale of land founded upon a sufficient consideration. Hence, such contracts may be specifically enforced upon an acceptance of their terms and a tender of the price within the time specified, and it is no objection that prior to such acceptance and tender no obligation rested upon the option-holder to purchase: *Frank v. Stratford-Hancock*, 13 Wyo. 37, 110 Am. St. Rep. 963, 77 Pac. 134; *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394. An agreement to convey land at the option of the proposed vendee within a given time and at a certain price, if made upon sufficient consideration, with full knowledge on the part of the person extending the option that he is bound, and the other party is not, is such a contract, as, though lacking in mutuality of remedy, will be enforced in equity at the instance of the proposed vendee. When the option-holder signifies his

acceptance within the time limited and upon the terms stated, the obligation of the contract becomes mutual and capable of enforcement at the instance of either party: *Johnson v. Trippe*, 33 Fed. 530.

There is abundant authority sustaining the proposition that an optional agreement by one party to sell and convey land to another for a stated price, if given upon a valuable consideration may be specifically enforced upon an acceptance and tender of the price within the time allowed by the contract, and it is not a valid objection in such case that, prior to acceptance and tender, no obligation rested upon the option-holder to purchase. This does not constitute such want of mutuality of obligation as will prevent specific performance of the option. In other words, it is now well settled that an optional agreement to convey, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be specifically enforced in equity, if it is made upon a proper consideration and accepted within the time fixed in the agreement: *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; *Simms v. Lide*, 94 Ga. 553, 21 S. E. 220; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Goodpaster v. Porter*, 11 Iowa, 161; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Boston etc. Ry. Co. v. Rose (Mass.)*, 80 N. E. 498; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Schroeder v. Gemeinder*, 10 Nev. 355; *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485; *Smith's Appeal*, 69 Pa. 474; *Yerkes v. Richards*, 153 Pa. 646, 34 Am. St. Rep. 721, 26 Atl. 221.

The general rule that contracts of sale must be mutual, or courts of equity will not enforce them, is subject to the exception that a contract for the sale of real estate at the option of the vendee only, upon election and notice, may be specifically enforced, and the refusal of the vendor to accept the purchase money will not destroy the mutuality, though the vendee could thereupon withdraw his election: *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149; *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485. An optional agreement to convey land, without any corresponding obligation or covenant to purchase will be specifically enforced in equity, if made upon a sufficient consideration, and such contract becomes mutual and capable of enforcement at the instance of either party, where the proposed vendee signifies his acceptance within the time limited, and upon the terms stated in the contract: *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Boston etc. Ry. Co. v. Rose (Mass.)*, 80 N. E. 498. An option for the purchase of real estate, if complete and certain as to its terms, and based on a valuable consideration, is converted into a contract of sale, which may be specifically enforced in equity by an acceptance by the vendee in accordance with its terms, and within the time limited. The purpose and effect of the option is the surrender by the vendor for a consideration, and for the time limited, of the right which he would otherwise have to withdraw the offer of sale contained therein. Want of mutuality of obligation will not prevent

the specific performance of such a contract: *Couch v. McCoy*, 138 Fed. 696. A contract under seal to convey land to another upon the payment by him of a stipulated price, provided such payment be made within a certain stipulated time, is obligatory, if supported by a consideration of five dollars actually paid by the obligee to the obligor. After the former has made his election to pay the stipulated price and has actually tendered it within the time specified in the contract and demanded a conveyance, there is no want of mutuality, but both parties are bound absolutely, and specific performance may be enforced: *Simms v. Lide*, 94 Ga. 553, 21 S. E. 220; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723. A contract giving one party the privilege of purchasing lands upon certain conditions is not void for want of mutuality on the ground that, though the seller is bound upon those conditions, the other party is not bound to purchase, unless he desires: *Marske v. Willard*, 169 Ill. 276, 48 N. E. 290. In such case the mutuality and the consideration for the agreement to convey consist in the party to whom the offer was made having actually done, upon the promise of the owner, what he was required to have done: *Perkins v. Hadsell*, 50 Ill. 216. The original lack of mutuality in the right to specific performance of such a contract will not preclude its enforcement when this want has been removed at the time when the action is brought: *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44. The reason for the above rule is stated in *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 355, where it was said that "it is true that by the option or proposal made by defendants, the complainant was not bound to purchase or accept the proposition, and the contract was not mutual because it had not been completed. Like all other offers or proposals upon the part of one party in the course of negotiations with another, the written option in this case was not binding on defendant until accepted and he was at liberty to withdraw at any time before acceptance, but when accepted before withdrawal the contract was then completed and mutual. Otherwise there seldom could be a contract of sale made. If the party making an offer to sell property in this way is not bound after acceptance because the offer was a unilateral promise or contract, then there could be no such thing as a valid contract based upon an offer and acceptance, unless the parties were together when the contract was made, and the offer and acceptance were nearly, if not quite, simultaneous."

A person who has not signed an option for the sale of land may enforce it against the one who has, although he could not be compelled to perform it, and when he has complied with the terms of the contract, the want of mutuality, if any there be, is waived or avoided by filing a bill to enforce, as thus the remedy becomes mutual: *Estes v. Furlong*, 59 Ill. 298; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *Dynan v. McCulloch*, 46 N. J. Eq. 11, 18 Atl. 822.

III. Consideration.

Nearly all of the cases heretofore cited distinctly state that to entitle the option-holder to a specific performance of his option he must have paid a valuable or sufficient consideration therefor, and where this specific question has been raised, the cases are uniform in holding that to entitle a complainant to specific performance of an optional contract, the contract sought to be enforced must be founded on a sufficiently fair consideration, and in such case a court of equity will inquire into the real consideration, although the contract bears a seal and recites a consideration: *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755. An option given without any consideration by the vendor of land to plaintiff to buy on demand certain land will not be specifically enforced, demand not having been made for six years, and the vendor during that time having put improvements on the land exceeding in value the price to be paid, and plaintiff having remained silent during all that time: *Davis v. Petty*, 147 Mo. 374, 48 S. W. 944.

A mere naked option to buy lands, not based on any consideration paid, is not an interest therein which a purchaser for value is bound to notice or which equity will regard. Such a contract is not favored in equity, and the want of mutuality may generally be urged as a bar to its specific performance: *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, 21 L. R. A. 133. Unilateral or optional contracts to convey lands or renew leases without any covenant or obligation to purchase or accept, and without any consideration, will not be specifically enforced in equity: *Hawrally v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613. Nor will such contract be enforced when there is an entire want of mutuality, when it is nothing more than a thirty day option to buy, not based on any consideration: *Jenkins v. Locke*, 3 App. Cas. (D. C.) 485. If a contract signed only by the owners of land, and without any consideration, agreed that at any time within six months they would take a specified price for their mineral interest, and upon receipt of such price would make title to the party named in the contract as the party of the second part, and where such contract stated that the party of the second part bound himself to make such tests as were satisfactory to himself, and to do other things toward the perfection of the sale as might be necessary on his part, and that he would not demand any right outside of the necessary tests until the payment of the purchase money, such contract is not mutual and binding on all of the parties, and specific performance thereof cannot be decreed: *Peacock v. Deweese*, 73 Ga. 570.

IV. Compliance With Terms of Option.

An acceptance of an option, to be good and to entitle the holder to specific performance, must be such as to conclude an agreement or contract between the parties. To do this it must in every respect

meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing them just as they stand: *Potts v. Whitehead*, 23 N. J. Eq. 512; *Henry v. Black*, 213 Pa. 620, 63 Atl. 250. Time is of the essence of such an offer generally, and unless the option-holder complies with its exact terms, he cannot demand its enforcement: *Stembridge v. Stembridge's Admr.*, 87 Ky. 91, 7 S. W. 611. Where an option has been given on land which has not been converted into a binding contract by acceptance in accordance with its terms, specific performance thereof cannot be enforced: *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A., N. S., 403. Nor will the option be enforced when it is not shown that the purchase money and notes for the deferred portions thereof were tendered to the option giver in accordance with the terms of the contract sought to be enforced: *Jenkins v. Locke*, 3 App. Cas. (D. C.) 485. If an option is given one for the purchase of stock and another for the purchase of real estate, with the understanding that if one were carried out the other should be also, a specific enforcement of the contract for the sale of the stock will not be decreed, at the suit of the prospective purchaser, where he does not tender performance of the contract for the sale of the real estate: *Reynolds v. Hooker*, 76 Vt. 184, 56 Atl. 988.

A proposed purchaser, under an option, who fails to offer payment for several months after the time specified is precluded from calling for a specific performance in the absence of a waiver of the time of payment: *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755. Or if the option-holder makes an offer to purchase on terms different from those set forth in the option, but according to an agreement to be subsequently made, but which is not made, a decree of specific performance will not be made, although the intended buyer paid the required hand money and subsequently agreed to purchase under the terms of the option: *Henry v. Black*, 213 Pa. 620, 63 Atl. 250. The failure of an option-holder to pay the amount specified in the option at the time fixed therein for its payment amounts to a decision on his part not to purchase the land upon the terms proposed, and deprives him of any right to enforce the contract: *Stembridge v. Stembridge's Admr.*, 87 Ky. 91, 7 S. W. 611.

V. Option Under Lease.

An option to purchase demised premises, which is one of the clauses in a lease under seal, is not a unilateral contract, nor is it without consideration, but such an option is a conditional contract, which, when exercised in a manner showing performance of the conditions prescribed, may be specifically enforced in equity: *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840; *House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 110 Am. St. Rep. 963, 77 Pac. 134; and the filing of a bill for specific performance and an offer to pay the price stipulated is such a sub-

stantial compliance on the part of the option-holder with the terms of the covenant as to entitle him to have it specifically executed: *Maughlin v. Perry*, 35 Md. 352.

Although the lease giving the lessee an option to purchase is signed by the lessor only, yet the lessee in entering into possession thereunder becomes liable for the rent, and may enforce the option in the same manner as if he had signed the lease: *White v. Weaver*, 68 N. J. Eq. 644, 61 Atl. 25. The same rule is laid down in *Hayes v. O'Brien*, 149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73, where the court further held that when such a contract is fairly entered into and is upon a sufficient consideration, equity will enforce it when there has been an acceptance of its terms by the lessee in apt time, and such a contract is a continuing obligation on the part of the lessor giving the option, which runs with the lease, which the lessee may accept, at his option, within the time limited.

An agreement to give the lessee of land an option of purchasing it may be enforced by him, although the election to purchase rests solely with him, and this optional right may be transmitted by him to his assignee, who in turn may elect to have it specifically enforced: *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526. An agreement by a landlord contained in a lease to convey the leased land to the tenant upon the expiration of the term, and the payment of an agreed purchase price, gives the tenant a right to purchase which will pass to his administrator, and to the assignee, and upon the payment of the purchase price by such assignee within the time limited, the contract of purchase becomes complete, and may be specifically enforced in equity: *Gustin v. Union School District*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156. A court of equity, in suits for specific performance of optional contracts and covenants in leases to convey the land, will enforce the covenant, although the remedy is not mutual, provided it is shown to have been made upon a fair consideration, and where it forms part of the contract or lease that may be the true consideration for it: *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Schroeder v. Gemeinder*, 10 Nev. 355. If a lease for a year provides that it shall continue in force from time to time after the expiration of the year, and also provides that the parties can terminate the lease at the end of the year or any term thereafter, and also stipulates that the tenant shall have the right to purchase the premises "at the end of said term" for a fixed sum, the tenant's option to purchase can be exercised at the end of the year, or at the end of each succeeding year until the lease is terminated, and when such option is exercised and the terms of its conditions complied with, the option-holder is entitled to have it specifically enforced: *Thomas v. Gottlieb etc. Brewing Co.*, 102 Md. 417, 62 Atl. 633. An optional agreement that in case the landlord agreed to sell the leased premises he would give the lessee the first chance to buy them, no price being suggested nor any method provided by

which to determine what the price should be, is too indefinite and uncertain to be specifically enforced: *Folsom v. Harr*, 218 Ill. 369, 109 Am. St. Rep. 297, 75 N. E. 987.

VI. Rights of Assignee.

The rights of the original option-holder pass to his assignee, who upon compliance with the terms and conditions of the optional contract has a right to have it specifically enforced. Thus, a contract to convey land to another signed by the vendor alone upon the payment to him of a stipulated price, provided such payment be made within six months of the date of the contract, is obligatory if supported by a consideration of five dollars actually paid to the obligor. After the option-holder has made his election to pay the stipulated price, and has actually tendered the amount within the specified time, and demanded a conveyance, there is no want of mutuality, both parties are bound absolutely, and specific performance may be enforced at the instance of the option-holder, suing in behalf of one to whom he has sold and assigned his interests in the premises or in the contract sought to be enforced, such assignee being made a coparty plaintiff as usee: *Simms v. Lide*, 94 Ga. 553, 21 S. E. 220. To the same effect, *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380. And a written contract whereby the owners of land, in consideration of a certain sum, and of another sum to be paid within a limited time, agree to sell and convey to another, though signed by the vendors only, is nevertheless binding upon them and capable of specific enforcement, at the instance of an assignee of the original vendee, upon due compliance with its terms, and in such case a tender of the balance of the purchase money within the time limited, and a continuing tender in the petition for specific performance, should be treated as equivalent to a compliance: *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

The right of an option-holder under a lease to purchase the demised premises passes to his assignee. Thus, an agreement by a landlord, contained in a lease, to convey the leased land to the tenant upon the expiration of the term, and the payment of an agreed purchase price gives the tenant a right to purchase, which will pass to his assignee, and upon the payment of the purchase price by such assignee within the time limited, the contract of purchase becomes complete, and may be specifically enforced: *Gustin v. Union School Dist.*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156. An option to purchase given to a lessee may be transmitted by him to his assignee, vesting the latter with the right to call for a specific performance on declaring his election, and this right may be enforced against a purchaser with notice from the original vendor: *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526. A vendee of the option given, unless he is a purchaser in good faith and without notice, may be compelled to perform the optional contract of his vendor: *Ross v.*

Parks, 93 Ala. 153, 30 Am. St. Rep. 47, 8 South. 368, 11 L. R. A. 148. The assignee of the lessee of such an optional contract as we have under consideration may maintain an action against the lessor for specific performance of the provision to convey the land: **House v. Jackson**, 24 Or. 89, 32 Pac. 1027. And the filing of the bill and offer to pay the price stipulated is such a compliance on the part of the assignee with the terms of the covenant as to entitle him to have it specifically executed: **Maughlin v. Perry**, 35 Md. 352.

PRATT FOOD COMPANY v. BIRD.

[148 Mich. 631, 112 N. W. 701.]

INJUNCTION—Injury to Business.—An injunction will lie to restrain a person from committing wrongful acts which tend to ruin complainant's business by bringing to bear upon his customers intimidating and coercive means. (p. 603.)

INJUNCTION—Injury to Business.—An injunction will lie to restrain a state food commissioner from unlawfully placing in the hands of every dealer in the state a bulletin in effect threatening them with prosecution in case they make use of complainant's food products in the form in which they are lawfully sold to them. (p. 603.)

CONSTITUTIONAL LAW—Title of Statutes—Amendments.—If what is introduced by way of amendment to a statute might have been incorporated in the statute under its original title, the statute as amended does not embrace more than one subject, and that is expressed in its title. (p. 604.)

CONSTITUTIONAL LAW—Title of Statute.—An amendatory provision in a statute, fixing a standard of pure food and providing means to prevent deception in the sale of such food is within the original title of an act to provide for the appointment of a dairy and food commissioner, and to define his powers and duties and fix his compensation. (p. 604.)

PURE FOOD LAWS—Application.—A preparation sold as "food" and labeled that, though it is not sold as a feeding stuff, that it fattens and improves stock, is subject to regulation under a pure food statute applying to all "condimental stock foods, patented and proprietary stock foods, claimed to possess nutritive properties and all other materials intended for feeding to domestic animals." (p. 605.)

Thomas, Cummins & Nichols and W. C. Rodman, for the complainant.

J. E. Bird, attorney general, G. S. Law and C. W. McGill, for the defendant.

632 MONTGOMERY, J. The bill in this case is filed to restrain the defendant, his clerks, and employes, from writing, printing, issuing, publishing, or sending out any bulletin, writing, publication, or notice, to the effect that complainant's preparations, sold as Pratt's Food for Horses and Cattle, Pratt's Poultry Food, and Pratt's Animal Regulator, or either of them, are not licensed under Act No. 12, Public Acts of 1905, and warning the public against buying or selling these preparations. The bill sets out that the defendant asserts and claims that these preparations come within the terms of the act, and that, unless restrained by injunction, he will so assert by bulletins issued to the trade, and by this method intimidate dealers and prevent their purchasing complainant's products. (We are stating simply the substance of the averments in brief.) It also asserted that the effect of such bulletins will be to destroy and ruin the complainant's trade, and work irreparable injury. Upon the hearing below the bill was dismissed, and the complainant appeals. Three questions are presented upon the record: 1. Whether, in view of the case, complainant is entitled to the remedy here invoked; 2. Whether Act No. 12, Public Acts of 1905, is constitutional; 3. Whether, if it be constitutional, the complainant's products come within the terms of the statute.

1. The statute in question is an amendment of Act No. 211, Public Acts of 1893, entitled "An act to provide for the appointment of a dairy and food commissioner, and to define his powers and duties and fix his compensation," and, by section 18 of the act, it is provided:

633 "Any manufacturer, company, person or persons who shall sell, offer or expose for sale or for distribution, in this state, any concentrated commercial feeding stuff used for feeding livestock, shall furnish with each car, or other amounts shipped in bulk, and shall affix to every package of such feeding stuff, in a conspicuous place, on the outside thereof, a plainly printed statement, clearly and truly certifying the number of net pounds in the car or package sold or offered for sale, the name or trademark under which the article is sold, the name of the manufacturer or shipper, the place of manufacture, the place of business, and a chemical analysis, stating the percentages it contains of crude protein, crude fibre, nitrogen, free extract and ether extract, all constituents to be determined by the methods adopted by the association of official agricultural chemists. Whenever any feeding stuff is sold

at retail, in bulk or in packages belonging to the purchaser, the agent or dealer shall furnish to him a certified copy of the chemical analysis named in this section. The term 'concentrated commercial feeding stuffs,' as used in this act, shall include linseed meal, cotton seed meal, pea meals, cocoanut meals, gluten meals, oil meals of all kinds, gluten feeds, maize feeds, starch feeds, mixed sugar feeds, hominy feeds, rice meals, oat feeds, corn and oat feeds, meat meals, dried blood, clover meals, mixed feeds of all kinds, slaughter-house waste products; also all condimental stock foods, patented and proprietary stock foods, claimed to possess nutritive properties and all other materials intended for feeding to domestic animals."

A penalty is provided for the violation of this provision.

It is strenuously insisted by the attorney general that, if it be conceded that the complainant's products do not come within the inhibition of this statute, yet no remedy by injunction exists, for the reason that the effect of issuing an injunction is to restrain the prosecution of a criminal proceeding. Numerous cases are cited, among them, *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864, *State v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596, and *Predigested Food Co. v. McNeal*, 1 Ohio N. P. 266. In so far as these cases lay down the rule that a court of equity will not interfere to restrain a ⁶³⁴ public officer from invoking the criminal law and instituting a prosecution for a violation of a statute, they have our full approval. A court of equity will not transfer to its own jurisdiction the trial of a criminal case; and this though the prosecution may fall with some hardship upon the accused party. Nor, as a general proposition, will a court interfere to restrain the publication of a libel. But we held in *Beck v. Railway T. Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407, that injunction will lie to restrain a combination of persons from acts which tend to ruin complainant's business by bringing to bear upon his customers intimidating and coercive means. The principle which should rule the present case is identical. If the acts which are threatened are unlawful, it cannot be doubted that placing in the hands of every dealer in the state a bulletin which in effect threatens them with prosecution in case they make use of these products in the form in which they are lawfully sold to them, would be to absolutely exclude complainant's business from the state. The case presented is very similar in this aspect to that

of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. Rep. 33, 47 L. ed. 90, which case involved the right of the postmaster general to exclude the complainants from the use of the United States mails. An order had been made excluding complainants from the use of the mails. The court interfered and held that such order was a violation of the property rights of the person affected and granted relief.

2. Is the law constitutional? It is claimed that the law is unconstitutional, in that it violates section 20 of article 4 of the constitution, which provides that no law shall embrace more than one object, which shall be expressed in its title. It is established by our decisions that, if what is introduced by way of an amendment to an act might have been incorporated in the act under its original title, there is no violation to this section: *People v. Gadway*, 61 Mich. 285, 1 Am. St. Rep. 578, 28 N. W. 101; *Attorney General v. Bolger*, 128 Mich. 355, 87 N. W. 366. The question is, therefore, ⁶³⁵ whether, under the original title, a provision fixing a standard of pure food, and providing means to prevent deception in the sale of such food, is within the title of an act to provide for the appointment of a dairy and food commissioner, and to define his powers and duties, and fix his compensation. We think the title is within our previous decisions sufficient. It is obvious to one reading this title that there must have been imposed upon the commissioner certain powers and duties to make his department of any value to the state, and, furthermore, that these powers and duties must have relation to something. It is equally obvious that the relation of these powers and duties must be to the subject which is brought within the department that is created, viz., the dairy and food department. The title is very similar to that which established the insurance bureau. In *People v. State Treasurer*, 31 Mich. 6, it was held that a title which read, "An act to establish an insurance bureau," was sufficiently broad to cover any pertinent regulations respecting the bureau's course of action toward those engaged in insurance, and any appropriate provisions for prescribing the duty due from the insurance companies to the state in the matter of taxation, without violating the constitutional provision.

3. The question of more difficulty is the question of fact, as to whether the preparations of complainant are concentrated commercial feeding stuffs as defined by the act cited above. It is true the testimony shows that upon each of the

labels which accompanied Pratt's Food for Horses and Cattle was the statement "Pratt's food is a regulator, to be used according to directions, and is not sold as a feeding stuff, nor is it to be fed in place of grain or any other feed."

But, in addition to claiming medicinal properties for the food, it was also stated how it should be used to fatten and improve stock. It was stated that: "It fattens both cattle and hogs quickly, makes them ⁶³⁶ grow larger and healthier, and makes their meat tender, more juicy, and better eating."

It also stated that for horses it "produces bone, muscle, better staying powers, and improves the wind." When this statute was enacted, commercial feeding stuffs were on the market, and this fact must have been known to the legislature. In employing the broad language "all condimental stock foods, patented and proprietary stock foods, claimed to possess nutritive properties and all other materials intended for feeding to domestic animals," the legislature intended to cover all preparations for which the claim of nutritive qualities was made. Complainant's preparations come within this language. Similar representations were made in the labels of other preparations. We are of the opinion that the circuit judge was right in holding that all these preparations were within the statute.

The decree is affirmed, with costs.

Blair, Ostrander, Hooker and Moore, JJ., concurred.

The Right to an Injunction against wrongful acts calculated to injure or ruin the complainant's business has often been recognized in recent years: *Underhill v. Murphy*, 117 Ky. 640, 111 Am. St. Rep. 262; *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 106 Am. St. Rep. 137; *Gray v. Building Trades' Council*, 91 Minn. 171, 103 Am. St. Rep. 477.

The Sufficiency of the Title of Statutes within the constitutional requirements is discussed in the notes to *Lewis v. Dunne*, 86 Am. St. Rep. 267; *Crookson v. County Commissioners*, 79 Am. St. Rep. 267; *Bobel v. People*, 64 Am. St. Rep. 70.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

TAYLOR v. GRAND LODGE, A. O. U. W.

[101 Minn. 72, 111 N. W. 919.]

EVIDENCE—Representation as to Age.—Representations of a person, since deceased, made ante litem motam respecting the date of his birth are admissible against his beneficiary in an action to recover insurance upon a benefit certificate issued to him in his lifetime. (p. 607.)

EVIDENCE—Representation as to Age—Life Insurance.—A prior application for life insurance in another insurance company made under conditions of a nature to vouch for the truthfulness of the representations therein contained, in which the date of the birth of the insured is different from that given in the application for insurance involved in the present action, is competent evidence as tending to establish the true date of such birth. (p. 609.)

LIFE INSURANCE—Applicant for—Presumption.—If the name and residence of an applicant for life insurance in two different companies and of the proposed beneficiary are the same in both applications, it must be presumed that the same person made both applications. (p. 610.)

EVIDENCE—Life Insurance.—Judicial Notice will be taken of the uniform and generally known custom of life insurance companies to require, as a condition precedent to the issuance of a policy, a formal written application duly signed by the applicant, together with a medical examiner's report disclosing minute information concerning the applicant's life and physical condition. (p. 611.)

W. B. Anderson, for the appellant.

C. J. Bartleson and C. H. Rossman, for the respondent.

⁷³ **BROWN, J.** This action was brought to recover upon a beneficiary certificate issued by defendant to Wilbur N. Taylor. A former appeal is reported in 96 Minn. 441, 105 N. W. 408, 3 L. R. A., N. S., 114, where the facts are fully stated. A second appeal resulted in a reversal of a judg-

ment in favor of defendant, and the cause was remanded for a new trial: 98 Minn. 36, 107 N. W. 545. A trial thereafter had resulted in a verdict for defendant, which was set aside on plaintiff's motion, and a new trial granted. Defendant appealed.

The only question presented on this appeal is the correctness of the ruling of the trial court on the admission of the evidence presently to be referred to. Membership in defendant society was, at the time Taylor joined it, limited to persons under the age of forty-five years. In his application for membership Taylor stated and represented that he was born on December 2, 1849, thus making him at that date forty-four years of age. The contention of the defendant is that this was ⁷⁴ a false and fraudulent statement, that Taylor was in fact born on December 2, 1846, and consequently, when he joined the society, over the age of forty-five years, and ineligible. We held on the first appeal that if this contention of defendant was true, and the statement referred to in the application was false and fraudulent, Taylor's certificate of membership was void, and plaintiff could not recover. The sole question contested on the last trial, so far as the present appeal is concerned, was the truthfulness or falsity of the representation that Taylor was born on December 2, 1849.

Plaintiff in her proof of death stated that he was born on December 2, 1846, but on the trial testified that she was incorrectly understood by the person preparing the proof; that she did not in fact so state, but, on the contrary, stated that she did not know the date of her husband's birth. Among other items of evidence tending to show the falsity of the statement, defendant offered in evidence, over plaintiff's objection, an application made by him some time prior to the application here in question to the Bankers' Life Association, upon which a policy of insurance was issued to him by that company. In that application the date of Taylor's birth was given as December 2, 1846, and corresponds to the date given by plaintiff in her proof of death in the case at bar.

On plaintiff's motion for a new trial the court below came to the conclusion that the ruling admitting this application in evidence was error, and a new trial was granted for that reason. It is urged by counsel for plaintiff that the application to the Bankers' Life Insurance Company was inadmissible, for the reasons (1) that as to plaintiff it was hearsay

and incompetent, (2) that there was not sufficient evidence that the application was made by the same Taylor who subsequently became a member of defendant society, and (3) that there was no evidence that deceased signed or executed the same; therefore that the court properly granted a new trial for the error in admitting it in evidence. We do not concur in either of these contentions.

1. The general rule under which declarations and admissions by third persons, not interested in or connected with the subject of the action, are excluded as hearsay evidence, has several well-defined exceptions, one of which includes admissions and declarations in respect to matters of family history or pedigree. Upon that subject statements of members of a family respecting relationships, births, marriages, and ⁷⁵ deaths, made ante litem motam, are by all authorities held admissible when pertinent to the issue on trial: 22 Am. & Eng. Ency. of Law, 2d ed., 640. The reason for the rule is found in the fact that direct evidence upon such matters is often unattainable, and they are susceptible of proof only in this indirect way. A living person may testify to his age, or date of his birth, though he derives his information upon the subject from his parents, or others having knowledge of the fact: *Chicago & A. R. Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. 497; *Commonwealth v. Stevenson*, 142 Mass. 466, 8 N. E. 341; *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541; *Grand Lodge v. Bartes*, 69 Neb. 631, 111 Am. St. Rep. 577, and note, 96 N. W. 186, 98 N. W. 715. And by analogy of reasoning a statement or declaration of the fact made by him in his lifetime, in a transaction in which that information was material, or at the family fireside or home, is also admissible: 16 Cyc. 1234, and cases cited.

The question has frequently arisen in cases involving alleged misrepresentation in applications for life insurance, both as respect the age of the applicant and his previous physical condition. In cases of "old line" insurance, where the contract is between the company and the beneficiary, to whom a vested interest in the insurance passes upon the issuance of the policy, admissions or declarations of the insured, made either before or after the insurance is effected, are held by most courts inadmissible against the beneficiary: *Swift v. Massachusetts*, 63 N. Y. 186, 20 Am. Rep. 522; *Valley M. L. Assn. v. Teewalt*, 79 Va. 421; *Pennsylvania M. L. S. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Niblack on Mutual*

Benefit Societies, 626; *Union P. L. I. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573. While the courts are not in full accord on that subject, they are practically uniform in admitting the evidence in cases like that at bar, where the contract of insurance is between the company and the member, the beneficiary having only an expectant interest. This situation is present in all benefit societies of the character of defendant, where the beneficiary may be changed at any time during the life of the insured. The cases upon both branches of the subject are commented on in Niblack on Mutual Benefit Societies at page 626: See, also, *McGowan v. Supreme Court*, 107 Wis. 462, 83 N. W. 775; *Rawson v. Milwaukee*, 115 Wis. 641, 92 N. W. 378; *Hunt v. Supreme Council*, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576.

⁷⁶ In *Union Cent. Ins. Co. v. Pollard*, 94 Va. 146, 64 Am. St. Rep. 715, 26 S. E. 421, 36 L. R. A. 271, the age of the insured was involved, it being claimed that he had falsely stated the date of his birth; and the court held that a prior application for insurance in the same company, in which a different date was given, was admissible against the beneficiary, not as evidence of a true date of birth, but as tending to show that the date given in the present application was knowingly false; there being other evidence in the case of the true date. That was an "old line" policy, and the vested interest rule obtains in that state. The date of birth was involved in *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286, and prior declarations of the insured as to his age were held admissible. In *Brown v. Greenfield Life Assn.*, 172 Mass. 498, 53 N. E. 129, applications to other insurance companies are held admissible as pertinent upon the question of the insured's physical condition. An application for a pension, stating the applicant's physical condition, was held competent evidence in an action on an insurance policy subsequently issued, in procuring which he represented himself as in good health, in *New Home v. Owen*, 39 Ill. App. 413. See, also, *Talbot v. Field*, 173 Mass. 188, 53 N. E. 403; *Smith v. National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *Fidelity Mut. Life Assn. v. Winn*, 96 Tenn. 224, 33 S. E. 1045; *Thomas v. Grand Lodge*, 12 Wash. 500, 41 Pac. 882. Upon the general subject of the admissibility of admissions and declarations of deceased persons, both as to matters relating to family history and in other respects, see *Dawson v. Mayall*,

45 Minn. 408, 48 N. W. 12; Halvorsen v. Moon, 87 Minn. 18, 94 Am. St. Rep. 669, 91 N. W. 28; Dixon v. Union Iron Works, 90 Minn. 492, 97 N. W. 375; Georgia R. & B. Co. v. Fitzgerald, 108 Ga. 507, 34 S. E. 316, 49 L. R. A. 175.

The application of the insured in the case at bar represented that he was born December 2, 1849, while the application to the Bankers' Life represented that he was born December 2, 1846. The contention of the defendant is that the latter application was properly received in evidence to prove the true date of his birth, and the rule of law referred to and the authorities cited sustain that position. It not only tended to establish the true date, but the further fact that the insured falsely and fraudulently represented the fact in his application to defendant. The application to the Bankers' was made in the course of a transaction in which the information was material, and there is no suggestion in the record that the statement then made was incorrect or the result of a mistake. It was made without apparent reason for misrepresentation, which, within the rule admitting such evidence, sufficiently vouches for its truthfulness; whereas, in the case at bar, had the true date been given, the applicant could not, under defendant's by-laws, have become a member of the association, and the reason for a false date was present. Curiously enough the date given the Bankers' company corresponds exactly with the date given in plaintiff's proof of death in the case at bar.

2. It is further contended by plaintiff that the evidence is insufficient to justify the conclusion that the Taylor who made the application to the Bankers' was the same person who became a member of defendant. A careful comparison of the two applications will admit of no argument on this subject. That the same person made both applications conclusively appears. The name is the same in each, the residence the same, Araminta Taylor is named as beneficiary in each, and other items of information therein contained point to one and the same person. The claim of identity is further shown by the fact that in the application to defendant Taylor stated that he had previously taken out insurance in the Bankers' Life.

3. The further claim that the evidence does not show that deceased signed and executed the application to the Bankers' is not sound. The application appears to have been in the usual form, and the evidence shows that it was received and

acted upon by the officers of the company. It is the universal and generally known and understood custom of life insurance companies to require formal written applications for life insurance, connected with which is a medical examiner's report disclosing minute information concerning the applicant's life and physical condition, and no policies are issued without compliance therewith. Of this general custom the court will take judicial notice, and in the absence of information to the contrary will presume that it was followed in this instance: McKibbin v. Great Northern Ry. Co., 78 Minn. 232, 80 N. W. 1052; McKibbin v. Wisconsin Central Ry. Co., 100 Minn. 270, 117 Am. St. Rep. 689, 110 N. W. 964, 8 L. R. A., N. S., 489; Braun v. Northern Pacific Ry. Co., 79 Minn. 404, 79 Am. St. Rep. 497, 82 N. W. 675, 984, 49 L. R. A. 319, and cases cited; 16 Cyc. 878. It was therefore unnecessary that affirmative evidence that the insured signed the application be produced. ⁷⁸ The record contains no inference or suggestion that it was not, and the facts and circumstances disclosed point to the conclusion that it was properly signed by Taylor, and that the answers to questions therein were made by him.

It follows that the learned trial judge was right in admitting the application in evidence, and wrong when he concluded, on the motion for a new trial, that he erred. We have examined the other rulings of the court on the trial, which counsel urged were such as to require a new trial, and find no error sufficient to justify vacating the verdict.

The order granting a new trial must, therefore, be reversed.

Proof of the Age of a Person is the subject of a recent note to Grand Lodge v. Bartes, 111 Am. St. Rep. 583. The age of a son may be shown by the declarations of his father since deceased: Travelers' Ins. Co. v. Henderson's Cotton Mills, 120 Ky. 218, 117 Am. St. Rep. 585.

SACHE v. WALLACE.

[101 Minn. 169, 112 N. W. 386.]

JUDGMENTS in Excess of Jurisdiction—Attack upon.—If a court exceeds its jurisdiction in rendering judgment, and such want of jurisdiction appears upon the face of the record, the judgment may be attacked either directly or collaterally at any time before or after the time for appeal, even by a person not a party to the action, but who is affected thereby in his property rights. (p. 614.)

JUDGMENT Outside of Issues—Attack upon.—If it affirmatively appears from the record that the court in rendering judgment went beyond and outside of the issues, and in the absence of one of the parties determined property rights against him which he has not submitted to it, the court has exceeded its authority, even though it had jurisdiction of the general subject of the matters adjudicated. Such a departure is not a mere irregularity; it is extrajudicial, and renders the judgment absolutely void. (p. 615.)

JUDGMENT—Extent of Relief.—In an Action to Determine Adverse Claims to real property, plaintiff is entitled, on the default of the defendant, to such relief only as he demands in his complaint, or such as comes within the scope of its allegations, and a judgment beyond that is void. (p. 616.)

JUDGMENTS—Validity—Jurisdiction.—In addition to jurisdiction of the parties and of the subject matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the question which the judgment assumes to decide, or the particular remedy or relief which it assumes to grant. (p. 617.)

JUDGMENT for Relief Beyond Issues submitted is unauthorized and beyond the power of the court, and may be collaterally attacked at any time by a party in interest, whether a party to the suit or not. (p. 617.)

JUDGMENT—Extent of Relief.—A statute providing for a form of action to determine adverse rights in real property is not designed as a means of acquiring title, but as an expeditious mode of extinguishing claims of title held adversely to plaintiff, and a judgment in favor of plaintiff in such an action, based upon the usual form of complaint, does not of itself operate to transfer title from defendant. (p. 621.)

W. G. White, for the appellant.

J. Schoonmaker, for the respondent.

170 BROWN, J. This action was brought under Revised Laws of 1905, section 4424, to determine adverse claims to certain real property. The complaint, so far as here material, alleges that the plaintiff is the owner in fee simple of the land, which is described therein; that it is vacant and unoccupied; and that defendant claims some title or interest therein adverse to plaintiff. "Wherefore the plaintiff prays that he may be adjudged to be the owner in fee simple of

the above-described real estate, and that the defendant may be adjudged to have no right, title, interest or estate in said real estate, and that he may have such other and further relief," etc. The summons was duly served, but defendant made no appearance in the action. Thereafter, on application of plaintiff, the court below made an order reciting the service of the summons and default of defendant and directing the entry of judgment "in all things in accordance with the prayer of the complaint." There were no findings of fact disclosing the source of plaintiff's title to the property, or the title or right of defendant, nor any finding upon which to predicate a judgment transferring to plaintiff defendant's title, if any she had. The order for judgment was in the form often used in default cases, and does not disclose that any evidence was offered for the consideration of the court. On June 27, 1905, judgment was duly entered by the clerk, substantially as prayed for in the complaint, to the effect that plaintiff was the owner of the property and that defendant had no title or right therein, and for the following further relief not prayed for in the complaint, nor embraced within the scope of the order for judgment, namely: "It is further adjudged and decreed that all the right, title, interest, estate or lien in, to, upon, or against said premises, held, owned, or possessed by said Ellen M. Gillette [defendant], be and it is hereby transferred to and vested in William R. Sache, the plaintiff in this action."

Defendant was in fact neither owner of the property at the time of the commencement of the action nor had she any interest therein when judgment was entered, having prior thereto conveyed the same to Emma L. Wallace; but the deed had not then been recorded. On October 31, 1906, more than a year after the entry of the judgment, ¹⁷¹ Mrs. Wallace, upon affidavits setting forth her ownership of the property and her ignorance of the action or judgment, moved the court to strike from the judgment the provision quoted above in full, by which the title of defendant was transferred to and vested in plaintiff, on the ground, among others, that the court had no authority to incorporate the same in the judgment, in that the relief thereby granted was not prayed for in the complaint. The court granted the motion, and plaintiff appealed.

It is contended by appellant that, conceding for the purposes of the point that the relief granted exceeded that to

which plaintiff was entitled under the complaint, the inclusion thereof in the judgment was an error or irregularity not going to the jurisdiction of the court, to be corrected by motion or appeal within the time prescribed by statute for the correction of such errors; that the judgment, not having been so proceeded against, became, after the time for appeal had expired, final and conclusive as to all the world. The merits of this contention depend wholly upon the question whether the embodiment of the excessive relief in the judgment was a mere irregularity, or whether it exceeded the jurisdiction and power of the court. If a mere irregularity, counsel's contention is sound. It is elementary that a judgment of a court of competent jurisdiction, after the expiration of the time of appeal, cannot be impeached, either directly or indirectly, for mere errors or irregularities not going to the jurisdiction of the court; but in all cases where the court exceeds its jurisdiction, and want of jurisdiction appears upon the face of the record, the judgment may be attacked at any time, before or after the time for appeal, even by a person not a party to the action, but who is affected thereby in his property rights: *Mueller v. Reimer*, 46 Minn. 314, 48 N. W. 1120; 12 Ency. of Pl. & Pr. 188; *Phelps v. Heaton*, 79 Minn. 476, 82 N. W. 990.

1. The courts are not in full harmony as to what constitutes an irregularity within the meaning of the rule referred to. Generally speaking, however, an irregularity may be defined as a failure to follow appropriate and necessary rules of practice or procedure, omitting some act essential to the due and orderly conduct of the action or proceeding, or doing it in an improper manner: 17 Am. & Eng. Ency. of Law, 2d ed., 481; *Jenness v. Circuit Judge*, 42 Mich. 469, 4 N. W. 220; *Holmes v. Russel*, 9 Dowl. 487. Errors or defects of this character, ¹⁷² that may be amended without prejudice to the absolute rights of the parties, do not affect the jurisdiction of the court to the extent that its final action is a nullity. But proceedings outside the authority of the court, or in violation or contravention of statutory prohibitions, are, whether the court have jurisdiction of the parties and subject matter of the action or proceedings, or not, utterly void: *Ex parte Simmons*, 62 Ala. 416; *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *Barton v. Saunders*, 16 Or. 51, 8 Am. St. Rep. 261, 16 Pac. 921.

The mere fact that the court has jurisdiction of the subject matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. If the court may do so under the guise of "jurisdiction of the subject matter," then it may commit all sorts of depredations upon the rights of parties, particularly in default cases. "Jurisdiction of the subject matter" means, not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide. Though it has general jurisdiction over the subject matter, for instance, of actions to foreclose mortgages, to quiet title to real property, or for damages for personal injuries, its power to decide and determine matters in dispute between the parties in a given action is limited to those questions which are brought before it by the pleadings. The foundation of the rule that judgments of a court of competent jurisdiction are attended with a presumption of absolute verity is the fact that the parties have been properly brought into court and given an opportunity to be heard upon the matters determined. But the foundation falls and the rule of verity ceases when it affirmatively appears from the record that the judgment adjudicated and determined matters upon which the parties were not heard. When the court goes beyond and outside the issues made by the pleadings, and in the absence of one of the parties determines property rights against him which he has not submitted to it, the authority of the court is exceeded, even though it had jurisdiction of the general subject of the matters adjudicated. Such a departure cannot be held a mere irregularity. This position is sustained both from the view point of our statutes upon the subject and under the rules and principles of the common law.

2. The action was one to determine adverse claims to real property. ¹⁷³ The complaint alleges title in plaintiff, and that defendant claims to have some estate or interest therein adverse to plaintiff. The prayer for relief was that plaintiff be decreed the owner of the property, and that defendant be adjudged to have no interest in or title to the same. The court ordered judgment for the relief demanded in the complaint. Plaintiff caused judgment to be entered for the other and further relief now objected to.

Our statutes (Rev. Laws 1905, sec. 4264) provide: That "as against a defendant who does not answer, the relief granted to plaintiff shall not exceed that demanded in the complaint. Against all others, he may have any relief consistent with the complaint and within the issue actually tried." This plain and explicit language ought, it would seem, to relieve from serious doubt the question whether a judgment entered in violation of its terms is void for want of jurisdiction. The command of the statute is unqualified, and its purpose is obvious. The object of the statute was to prevent "snap judgments" against defendants, who, upon examination of the complaint in an action against them, are content that the plaintiff may have the relief therein demanded, and for that reason do not appear or answer. Defendants so situated may rely upon the statute for their protection, and are not required to follow the action or the proceedings therein, for the purpose of ascertaining whether a judgment other than that demanded has been entered against them. A judgment in violation of the statute cannot, therefore, be a mere irregularity to be cured by amendment, but the exercise of power expressly withheld from the court, and consequently beyond its jurisdiction.

Although every exercise of power not possessed by a court will not necessarily render its action a nullity, it is clear that every final act, in the form of a judgment or decree, granting relief the law declares shall not be granted, is void, even when collaterally called in question. This is fundamental, and must be applied to this case, unless we are to adopt a new rule, not contemplated by the lawmakers, which will compel all litigants to be vigilant in preventing an unlawful invasion of their rights. A construction of the statute which would require this of the defendant in a case of this character, or sustain a judgment for greater relief than that demanded, on the theory that the excessive relief was a mere irregularity, would emasculate the statute and render ¹⁷⁴ it inoperative and of no practical value. We do not so construe it, but, on the contrary, hold that a violation of its command is extrajudicial and void. Of course, an instance might arise, in the case of an imperfectly framed prayer for relief, where a judgment beyond its scope might be sustained, if within the allegations of the complaint. But such is not this case. The prayer of the complaint here before us is complete, and asks for all the relief the allegations of the complaint justify.

A number of authorities are cited by counsel for the plaintiff which apparently sustain his view of this question. But we are not inclined to follow them. They are at variance, as seems to us, with sound logic, reason, and the weight of authority. In Wisconsin, for instance, it has been held that a judgment sentencing a person to a longer term of imprisonment than the statute warrants is an irregularity, to be corrected by appeal, and not void for want of jurisdiction: *In re Graham*, 74 Wis. 450, 17 Am. St. Rep. 174, 43 N. W. 148. The contrary doctrine is upheld by the supreme court of the United States: *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118, and cases there cited. The Wisconsin rule is followed in South Dakota, but by a divided court. Under a statute similar to our own, two of the three judges of the supreme court of that state held that a judgment in a default case which granted relief beyond that demanded in the complaint was not void, but merely erroneous or irregular: *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698, 90 N. W. 1042, 58 L. R. A. 811. In Indiana, in actions for the recovery of money, a judgment for an excessive amount is held erroneous but not void; while in other forms of actions, as will be presently shown, judgments granting relief in excess of that demanded by the pleadings are held by that court void for want of jurisdiction: *Gum E. R. Co. v. Mexico R. Co.*, 140 Ind. 158, 39 N. E. 443, 3 L. R. A. 700; *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161. The distinction between the two classes of judgments is found in the fact that the miscalculation of interest, or other mistakes in reference to the amount of recovery, are clerical in their nature, and should be corrected by motion or appeal. A clear departure from the relief demanded in equitable actions materially differs from an excessive judgment in actions for money only.

3. But the weight of authority sustains the proposition that at common ¹⁷⁵ law the judgment is void for want of jurisdiction. In fact, it may be said our statute created no new rule on the subject, but merely adopted that existing at common law. It is laid down in 1 Black on Judgments, 242, as a general principle, that, in addition to jurisdiction of the parties and subject matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to decide, or the particular remedy or relief which it

assumes to grant. Support for this doctrine is found in numerous well-considered cases.

In *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161, a complaint in replevin tendered no issue except the right of possession, yet judgment was entered determining the title to the property as between the parties. It was contended in an action upon the replevin bond that, the court having had jurisdiction of the parties and the subject matter of the replevin action, the judgment therein was conclusive against collateral attack. The court held the judgment void, in so far as it attempted to adjudicate upon the question of title to the property, for the reason that that question was not involved under the pleadings. The court said: "Neither reason nor authority lends any support to the view that, because suitors have submitted certain designated matters to the consideration of a court, the tribunal is thereby authorized to determine any other matter in which the parties may be interested, whether it be involved in the pending litigation or not"; citing *Munday v. Vail*, 34 N. J. L. 418; *Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. 20; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Bigelow on Estoppel*, 92. The decision in that case was followed in *Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51, and in *Unfried v. Heberer*, 63 Ind. 67. The last case was cited with approval by Mr. Justice Brewer in *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. ed. 464.

A judgment for relief beyond the issues was held unauthorized, and "not within the power of the court," in *Boogher v. Frazier*, 99 Mo. 325, 12 S. W. 885. Such is the law in the state of Illinois: *People v. Seeyle*, 146 Ill. 189, 32 N. E. 458; *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593. In *Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132, the Ohio supreme court held that a judgment on a subject of litigation within the jurisdiction of the court, but not brought before it by any statement or claim of the parties, is null and void, and ¹⁷⁶ may be collaterally impeached; citing *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706. To the same effect, *Seamster v. Blackstock*, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36. It was said in *Sandoval v. Rosser*, 86 Tex. 682, 26 S. W. 933, "that a court has no more power, until its action is called into exercise by some sort of pleading, to render a judgment in favor of a party than it has to enter a judgment against him." And the judgment there involved, granting

relief beyond the pleadings, was held open to collateral attack: *Dunlap v. Southerlin*, 63 Tex. 38; 1 Black on Judgments, 241.

The case of *Ritchie v. Sayers* (C. C.), 100 Fed. 520, involved a collateral attack on a judgment, and the court after referring to the rule as generally stated in the books, namely, that the judgment of a court having jurisdiction of the parties and the subject matter of the action is conclusive and cannot be collaterally called into question, said: "That may be conceded. But the question is, Did it have jurisdiction to enter the particular decree and judgment thereon that it did enter? As we have before seen, we reach the conclusion that the particular judgment could not be entered; and it is a well-settled principle that, although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the decree and particular judgment, then that decree and judgment may be collaterally impeached"; citing *United States v. Walker*, 109 U. S. 258, 3 Sup. Ct. Rep. 277, 27 L. ed. 927; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118; *Ex parte Cuddy*, 131 U. S. 280, 9 Sup. Ct. Rep. 703, 33 L. ed. 154; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *Seamster v. Blackstock*, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36.

The two cases in 131 U. S. are directly opposed to the doctrine of the Wisconsin supreme court laid down in *Re Graham*, 74 Wis. 450, 17 Am. St. Rep. 174, 43 N. W. 148, as already pointed out. In the *Nielsen* case (131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118), the supreme court of the United States declared such a judgment wholly void, and the person there under sentence of imprisonment not authorized by law was released upon habeas corpus. In the *Cuddy* case (131 U. S. 280, 9 Sup. Ct. Rep. 703, 33 L. ed. 154), the same court held that the fact that a judgment was excessive and unauthorized might be shown in habeas corpus, though the excess did not appear on the face of the record. It was held in *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603, that, to render a judgment within the jurisdiction of the court, not only jurisdiction¹⁷⁷ over the parties and the subject matter must appear, but it must also appear that the matter acted upon by the court was before it under the pleadings, and the judgment there involved, as to matters not presented in the pleadings, was held void on indirect attack. Such is the law in Kansas (*Watkins L. M.*

Co. v. Mullen, 8 Kan. App. 705, 54 Pac. 921), where the court approves the rule as laid down in 12 American and English Encyclopedia of Law, second edition, 246, to the effect that a judgment of a court having jurisdiction of the case, but not jurisdiction to enter the particular judgment, may be collaterally impeached, citing *United States v. Walker*, 109 U. S. 258, 3 Sup. Ct. Rep. 277, 27 L. ed. 927, *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118, and other cases herein referred to. That jurisdiction of the question the court assumes to decide, as well as of the parties and the subject matter of the action, is essential to the validity of a judgment is laid down as a general rule in 23 Cyc. 684.

The tendency of the courts to enlarge the definition of "jurisdiction," by many text-writers and judges seemingly limited to authority over the subject matter and parties is referred to in *Newman v. Bullock*, 23 Colo. 217, 47 Pac. 379, with the statement that it should, properly defined, include, not only power to hear and determine, "but power to render the particular judgment in the particular case." The court in that case sustained a collateral attack upon a judgment offered as evidence on the ground that it was void on its face, for the reason that the relief therein granted exceeded the issues made by the pleadings; citing 1 Black on Judgments, secs. 215, 242; *Johnson v. Johnson*, 20 Colo. 143, 36 Pac. 898; *Munday v. Vail*, 34 N. J. L. 418. In the case last cited a decree in equity granted relief beyond that prayed for in the complaint, and the court, on collateral attack, held it invalid. It is a leading case on this subject, and is quoted from in *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. ed. 464. In disposing of the question the New Jersey court said: "A defect in a judgment, arising from the fact that the matter decided was not embraced within the issue, has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these¹⁷⁸ particular interests which they choose to draw in question that a power of judicial decision arises."

The doctrine of the cases cited has been applied in this state. In *State v. Miesen*, 98 Minn. 19, 106 N. W. 1134, 108 N. W. 513, a judgment imposing a punishment in contempt proceedings not authorized by law was collaterally assailed and held void in habeas corpus proceedings: In *re White*, 43 Minn. 250, 45 N. W. 232. See, also, *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 38 Am. St. Rep. 747, 55 N. W. 218, 12 Ency. of Pl. & Pr. 131, and cases there cited. In view of this array of judicial opinion, we have no difficulty in reaching the conclusion that the judgment in question, in so far as it attempts to transfer to plaintiff the title held by defendant is *coram non judice*, and void.

4. But it is further contended by plaintiff that this particular feature of the judgment came within the scope of the complaint and the action, and that the relief was therefore properly granted. This contention is untenable. The statute providing for this form of action to determine rights in real property was not designed as a means for acquiring title, but, on the contrary, was intended as an expeditious mode of quieting and extinguishing claims of title held adversely to plaintiff: *Camp v. Smith*, 2 Minn. 131 (155). A judgment in such an action, based upon the usual form of complaint, does not of itself operate to transfer title from defendant to plaintiff: *Minn. Debenture Co. v. Johnson*, 94 Minn. 150, 110 Am. St. Rep. 354, 102 N. W. 381. The reason for this is found in the fact, like the old ejectment action, that there is nothing of record to disclose or reveal the title that was in fact adjudicated. And though an ordinary judgment in such an action might be made a link in the chain of title, by evidence dehors the record connecting plaintiff with the title adjudicated (*Sedgwick & Wait on Title to Land*, sec. 523), yet, standing alone, the judgment is evidence only of the fact that the rights of the defendant have been extinguished.

But, conceding that a transfer of title may be effected in this form of action under proper pleadings, it is clear that such was not the purpose of this action. The complaint was not framed upon such a theory. It simply alleged that defendant claimed some title or interest in the land adverse to plaintiff, and judgment was demanded that she be adjudged to have no title.

¹⁷⁹ The case in this respect is analogous to *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 38 Am. St. Rep. 747, 55 N. W. 218; 12 Ency. of Pl. & Pr. 131. There, in an action to foreclose

a mortgage, the complaint alleged that one of the defendants claimed some lien upon or interest in the mortgaged premises, the basis of which was unknown to plaintiff, but that it was subordinate and junior to plaintiff's mortgage. Judgment was demanded that defendant set up his claim or be forever barred from asserting it. The defendant did not answer, and default judgment was taken against him, in which it was adjudged that he had no right, title or interest in the property whatsoever. In a subsequent action by defendant to foreclose a mortgage upon the property held by him, and existing at the time of the pendency of the former action, it was insisted that his rights under the mortgage were barred by the former judgment, for it was there determined that he had no interest in the property. The court held that the judgment went beyond the issues made by the complaint in the former suit, and was void. The case is parallel to that at bar and in line with the authorities heretofore cited. As pertinent to this feature of the case, see *Alexander v. Thompson*, 101 Minn. 5, 111 N. W. 385. The complaint in the case before us did not seek a transfer of title, and section 4391 of Revised Laws of 1905 has no application. That statute can have no reference to other than actions in which it is necessary to pass title in order to carry the judgment of the court into effect.

This disposes of all the questions necessary to be considered, and results in an affirmance of the order appealed from. It is probable, under the authorities cited, that the judgment could have been as successfully assailed in other proceedings, when offered in evidence in support of plaintiff's title to the land; but the right to correct it in this manner is clear.

Order affirmed.

Judgments Outside of the Jurisdiction.—*The Doctrine of the Principal Case* will be found discussed in the notes to *Koepke v. Hill*, 87 Am. St. Rep. 173; *Falls v. Wright*, 29 Am. St. Rep. 78. A plaintiff is confined to a recovery upon the cause of action declared upon: *Camp v. First Nat. Bank*, 44 Fla. 497, 103 Am. St. Rep. 173. In a suit for one purpose there can be no decree for another; and a decree which has no matter in the pleading to rest upon is void: *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959; *Johnson-Brinkman Com. Co. v. Central Bank*, 116 Mo. 558, 38 Am. St. Rep. 615; *Reynolds v. Stockton*, 43 N. J. Eq. 211, 3 Am. St. Rep. 305. One of the essentials of a valid judgment is that the court pronouncing it have jurisdiction to render that particular judgment. Jurisdiction includes not only the power to hear and determine, but also the power to render the particular judgment in the particular case: *Russell v. Shurtleff*, 28 Colo. 414, 89 Am. St. Rep. 216.

MINNEAPOLIS THRESHING MACHINE COMPANY v.
HANSON.

[101 Minn. 260, 112 N. W. 217.]

DEEDS—Conditions Subsequent—Forfeitures.—While conditions subsequent in deeds, which result in a forfeiture upon failure to perform, are not favored, and are strictly construed, they must be upheld when clearly expressed, and not incapable or impossible of performance. (p. 624.)

DEEDS—Conditions Subsequent—Breach—Effect on Mortgage. If a grantee in a deed containing a condition subsequent mortgages the land, and the mortgagee takes the mortgage with full knowledge of such condition, he is not entitled to any relief upon the breach thereof. (p. 625.)

Kerr & Fowler, for the appellant.

Stuart & Finstad and G. Clague, for the respondent.

²⁶⁰ ELLIOTT, J. In October, 1899, Synnove Newhouse conveyed eighty acres of land by warranty deed to R. J. Hanson. In this deed the express consideration was \$500, and also the following agreement: "As a further consideration for the conveying said premises above described to the party of the second part by the party of the first part the said party of the second part agrees to pay ²⁶¹ party of the first part the sum of \$225 a year during each and every year so long as said party of the first part may live; . . . the sum of \$112.50 thereof to be paid April 1st of each year, and the sum of \$112.50 thereof to be paid October 1st of each year. And it is expressly understood and agreed that, provided said party of the second part fails to make said payments as herein mentioned, then this instrument shall be null and void; but, if said payments are made as herein provided, it shall be of full force and effect."

Thereafter R. J. Hanson and wife conveyed the land to Christ Hanson for a consideration of one dollar and a further agreement by the grantee to pay Newhouse the sum of \$225 a year in semi-annual installments, with a provision "That if said second party fails to make each and every of said payments as hereinbefore mentioned and provided then this instrument shall be null and void."

Christ Hanson went into possession of the land under this deed, and while in such possession mortgaged it to the Minneapolis Threshing Machine Company, the appellant, to secure

his debt of \$1,675. In March, 1905, Hanson, having defaulted in the payments, surrendered possession of the land to Newhouse, who then re-entered for the purpose of re-vesting herself with her former estate therein. In this action to foreclose the mortgage the court held that the condition as to future payment created a condition subsequent, and that the plaintiff had no interest in the land, and could not, as against Newhouse, foreclose its mortgage. The appeal is from an order denying a motion for a new trial.

The appellant admits that there was a default in making the payments to Newhouse, but contends that it had a valid mortgage on the land, and that its interest could not be divested by the surrender by Hanson of the possession to Newhouse; that the condition in the deed should not be construed as a strict condition subsequent; and that it should be permitted to perform the condition by payment of the present value of the annual payments as estimated from the annuity tables. In *Doescher v. Spratt*, 61 Minn. 326, 63 N. W. 736, the deed contained ²⁶² the following provision: "This grant is made upon the express condition that said August R. Doescher [the grantee] shall pay unto Henry Doescher and Helena Doescher [the grantors], or the survivor of them, the sum of \$200 annually on the first day of November in each and every year in their life." It was held that this did not create a condition subsequent, but that by reservation it created a lien on the premises which was similar to a purchase money mortgage. The deed contained no provision for re-entry, and in its absence the court refused to construe the provision as creating a condition subsequent. In the present case the provision contains an express statement that the deed shall become null and void in the event of failure to make the payments as therein provided. While conditions subsequent which result in a forfeiture upon failure to perform are not favored, and are strictly construed, they must be upheld, when clearly expressed and not impossible of performance: *Hamel v. Minneapolis etc. Ry. Co.*, 97 Minn. 334, 107 N. W. 139; *Farnham v. Thompson*, 34 Minn. 330, 57 Am. Rep. 59, 26 N. W. 9; *Thrall v. Spear*, 63 Vt. 266, 22 Atl. 414; *Randall v. Wentworth*, 100 Me. 177, 60 Atl. 871. But courts do not favor forfeitures, and if parties intend to create a condition subsequent, the breach of which will result in a forfeiture, they must use language which clearly expresses such intention. In *Doescher v. Spratt*, 61 Minn. 326, 63 N.

W. 736, there was no provision for re-entry, and it was held that in the absence of such a provision the language used showed an intention to reserve a lien. But in the present case the deed declares that a failure to make the payments will make the deed null and void, and this as clearly expresses the intention of the parties as would a provision for re-entry. The trial court correctly held that this was a condition subsequent, upon the breach of which the grantor was entitled to the possession of the land.

The appellant further contends that it should be allowed its lien upon the land upon making compensation to Mrs. Newhouse. It prays that "The amount to become due to the said Synnove Newhouse under the terms and conditions of said conveyance, superior and prior to the plaintiff's said mortgage, and that the amount now due and unpaid (if anything), and the amount to become due to the said Synnove Newhouse during the term of her natural life, ²⁶³ be determined in accordance with the experience tables of mortality; that upon the determination of such amount the plaintiff be permitted to pay the same to the said Synnove Newhouse; and that thereupon the plaintiff be subrogated to all the rights of said Synnove Newhouse to the said lien so held by her by virtue of the terms of said deed."

We fail to see why the appellant is entitled to require Mrs. Newhouse to modify her contract with Hanson. The appellant, as mortgagee, is asking for something to which the grantee in the deed would not have been entitled in a court of equity. It is not necessary to say that equity can give no relief from the consequences of a breach of a condition subsequent. The appellant has shown no equities which entitle it to such relief in this case. The deed called for certain payments to be made promptly at stated intervals during the lifetime of the grantor. The grantor has done nothing which gives rise to any equity in favor of the appellant. Her rights are determined by the deed. The grantee of the original grantee attempted to mortgage the land, and the mortgagee took the mortgage with full knowledge of the condition. It was not misled as to the fact, and no excuse is even suggested for the failure to make the payments when they were due.

The order of the district court is affirmed.

Conditions Subsequent are not favored, and no provision in a deed will be interpreted to create such a condition if the language will bear any other reasonable interpretation: *Hawley v. Kafitz*, 148 Cal. 393, 113 Am. St. Rep. 282. As to what words create a condition subsequent, see the note to *Ecroyd v. Coggeshall*, 79 Am. St. Rep. 747. A conveyance which purports to be in consideration that the grantee and his successors in interest will furnish the grantor board and washing during his lifetime, and will, without unnecessary delay, remove to and occupy the premises and continue to do so during such life, and that the grantee and his successors will convey no part of the property during the lifetime of the grantor, gives the grantee an estate upon conditions subsequent: *Lewis v. Lewis*, 74 Conn. 240, 92 Am. St. Rep. 240. The mode of taking advantage of breaches of conditions subsequent is the subject of a note to *Trustees of Union College v. New York*, 93 Am. St. Rep. 572.

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. ELFSTROM.

[101 Minn. 263, 112 N. W. 252.]

EVIDENCE—Carbon Copies.—Different impressions of a writing or contract produced by placing carbon paper between other sheets of paper and writing upon the outside sheet, so as to produce a fac-simile upon the one underneath, are duplicate originals, and either may be introduced in evidence without accounting for the non-production of the other. (p. 627.)

G. S. Grimes, for the appellant.

Buffington & Buffington, for the respondent.

²⁶⁴ ELLIOTT, J. This was an action brought to recover upon a written contract for the purchase price of a certain McCormick binder, which the plaintiff claimed it sold and delivered to the defendant. The jury returned a verdict in favor of the plaintiff, and the appeal is from an order denying the alternative motions for judgment in favor of the defendant notwithstanding the verdict or for a new trial.

Upon the appeal it is claimed that the action was prematurely ²⁶⁵ brought, that the defendant renounced the contract before any delivery or attempted delivery was made, and that no delivery of the binder was in fact ever made. None of these questions were raised in the court below, and cannot be considered for the first time in this court.

The parties submitted two questions to the trial court: 1. Was the machine which was delivered the kind of machine which had been ordered by the defendant? And 2. Was the

purchase price due upon delivery, or not until October 1, 1906? No question was raised as to the delivery of a machine, and the defendant testified that a McCormick binder was delivered to him. The court charged the jury: "It is conceded the machine that was delivered was a right-hand machine, and if it was expressed in the contract it was to be a left-hand machine, then they did not deliver the property that they agreed to deliver, and the defendant is not bound to pay for it. But bear in mind, gentlemen of the jury, that this language must appear in that contract which is in here, and it is a question for you to determine. If nothing was said in that contract whether it was to be a left-hand or a right-hand machine the machine that was delivered in that regard would satisfy the contract—would be a perfect contract on the part of the plaintiff." No exception was taken to this instruction.

The court also submitted the question whether the contract provided for payment on delivery, or not until October 1, 1906, and upon this issue the jury found for the plaintiff. The motion for judgment notwithstanding the verdict was therefore properly denied.

The remaining question relates to the reception in evidence of what the appellant claims was a mere copy of the contract without having first accounted for the absence of the original. This presents an interesting and somewhat novel question, but which, by reason of the introduction of labor-saving devices in modern offices, is liable to arise more frequently in the future. A sheet of carbon paper was placed between two sheets of order paper, so that the writing of the order upon the outside sheet produced a fac-simile upon the one underneath. The signature of the party was thus reproduced by the same stroke of the pen which made the surface, or exposed, impression. In *State v. Teasdale*, 120 Mo. App. 692, 97 S. W. 995, it was held that a carbon copy of a letter was not admissible in evidence until the original letter from which it was made was accounted for. The signature would not, under ordinary ²⁶⁶ circumstances, appear upon the carbon copy of such a letter. In *Chesapeake & O. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161, it was held that a carbon copy made at the same time and by the same impression of type may be regarded as a duplicate original of the letter itself and admitted in evidence without notice to produce the letter. We think this view can be sustained, and that a clear distinction

exists between letter-press copies of writings and duplicate writings produced as was the contract in the case at bar. It is well settled that, where a writing is executed in duplicate or multiply, each of the parts is the writing which is to be proved, because by the act of the parties each is made as much the legal act as the other: *Crossman v. Crossman*, 95 N. Y. 145; *Hubbard v. Russell*, 24 Barb. 404; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Jackson v. Denison*, 4 Wend. 558; *Barr v. Armstrong*, 56 Mo. 577; *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146; *Cleveland & T. R. Co. v. Perkins*, 17 Mich. 296; *Philipson v. Chase*, 2 Camp. 110. It is very generally held that a reproduction of a writing by a letter-press cannot be considered as a duplicate: 2 *Wigmore on Evidence*, sec. 1234, and cases there cited; *Menasha W. W. Co. v. Harmon*, 128 Wis. 177, 107 N. W. 299.

The distinction between letter-press copies and instruments produced by the use of carbon paper, as in this instance, seems reasonably clear and satisfactory. What makes two numbers of an instrument duplicates and equivalents is the fact that the legal act of the parties as consummated embraces them both. Letter-press copies are produced by an act distinct from and subsequent to the consummation of the legal act of execution. It may or may not be the act of the parties to the contract. We know from common experience that such copies are ordinarily produced by the labor of clerks and other employés, and that the results are not always satisfactory. But all the numbers of a writing which result from the completion of the legal act of the parties, although aided by mechanical devices or chemical agencies, meet the requirements of originals. If the reproduction is complete, there is no practical reason why all the products of the single act of writing the contract and affixing a signature thereto should not be regarded as of equal and equivalent value. In this instance the same stroke of the pen produced both signatures. The argument that the recognition of these instruments as duplicates would encourage fraudulent practices does not touch the principle involved.

The order of the district court is affirmed.

A Sworn Copy of a letter-press copy of a lost letter is competent as evidence of the contents of the letter, without producing the letter-press copy: Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469.

When an Instrument is Executed in Duplicate, each party receiving one, both are originals: *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Jones v. Hoard*, 59 Ark. 42, 43 Am. St. Rep. 17.

BRIXIUS v. REIMRINGER.

[101 Minn. 347, 112 N. W. 273.]

HOMESTEADS—Separate Parcels of Land.—If two parcels of land corner with each other, are connected by a road and occupied and cultivated as one farm, they may be selected and claimed as a homestead, when they do not exceed the legal area and value, although the residence and necessary buildings are all located upon one of such parcels. (p. 630.)

F. H. Lindsley and T. Kneeland, for the appellant.

P. J. Healy and J. B. Olivier, for the respondents.

³⁴⁷ LEWIS, J. For many years respondents owned and occupied a ten-acre tract of land, upon which was located the residence and necessary buildings, and also owned and farmed, in connection therewith, another ten-acre tract upon which were no buildings. The two pieces touched only at the corner. Appellant succeeded to a judgment against respondents, under which he sold the tract not occupied by buildings, and brought this action in ejectment to recover possession thereof. The trial court found for respondents upon the ground that the land was exempt from the judgment lien, for the reason that it was a part of respondents' homestead. The court found, from the evidence, that ever since 1899 respondents occupied and claimed the twenty acres as their homestead; that they passed and repassed from the one piece of land to the other on a farm road, which for eight years they had constantly used for domestic and farming purposes, and during all of such time occupied and cultivated the entire twenty acres as their homestead.

³⁴⁸ In the case of *Kresin v. Mau*, 15 Minn. 87 (116), this court held that two tracts of land merely touching at a corner did not constitute one body or tract of land, and therefore the tract on which the buildings were not located did not constitute a part of the homestead. If in that case it had been made to appear that the two tracts were used and cultivated as one farm, and that there was a regular passageway, or road, connecting the property, we doubt whether the court would have so held. The constitutional provision is: "A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law." It

was held in an early case—*Cogel v. Mickow*, 11 Minn. 354 (475)—that the amount of property constituting the exemption could be measured by its area as well as by its cash value, and that the homestead act was constitutional.

The language of that act, viz., “Consisting of any quantity of land not exceeding eighty acres, and the dwelling-house thereon, and its appurtenances,” does not necessarily imply that the quantity of land may not consist of two or more separate descriptions, or tracts, of land, provided the same are so situated that they may be occupied and cultivated as one body of land. The words “amount of property” and “quantity of land,” employed in the constitution and in the act, respectively, do not necessarily mean one parcel or compact body of land. These provisions should not be strictly construed. It may not always be possible to acquire a sufficient amount of land to meet such strict requirements. The different parcels should be so connected that they can be used as one tract: *Phelps v. Northern Trust Co.*, 70 Minn. 546, 73 N. W. 842. It is not material whether respondents acquired a legal highway between the two parcels. The essential thing to constitute a quantity of land within the homestead law is that it shall be occupied and cultivated as one piece or parcel of land, on some part of which is located the residence. This object is accomplished when two parcels touch at the corners, provided the essential conditions to constitute a homestead exist. In *Linn County Bank v. Hopkins*, 47 Kan. 580, 27 Am. St. Rep. 309, 28 Pac. 606, *Kresin v. Mau*, 15 Minn. 87 (116), was cited; but in the Kansas case it does not appear whether or not the two tracts were connected by a roadway and occupied and cultivated as one farm. In *Clements v. Crawford County Bank*, 64 Ark. 7, 62 ³⁴⁹ Am. St. Rep. 149, 40 S. W. 132, the statute provided that the homestead, outside any city, etc., should consist of not exceeding one hundred and sixty acres of land, with improvements thereon; and the court held: “Where two parcels of land corner with each other, they are contiguous, they touch; and there can be nothing unreasonable or unjust in allowing the two pieces to be selected and claimed as a homestead, where they constitute all the land the claimant owns and do not exceed the legal area and value.” In *Slaughter v. Karn*, 15 Ky. Law Rep. 429, 23 S. W. 791, the court of appeals held that where a debtor, owning eighty-four acres of land, exchanged twenty acres for a smaller tract on which

there was a house, and moved into it, his residence lot and the remaining sixty-four acres, connected by a passway one hundred and fifty yards long, constituted one tract within the meaning of the homestead law.

Affirmed.

Two Parcels of Land Which Corner on each other may be selected as a homestead: Clements v. Crawford County Bank, 64 Ark. 7, 62 Am. St. Rep. 149. Compare Linn County Bank v. Hopkins, 47 Kan. 580, 27 Am. St. Rep. 309. And the mere fact that some of the buildings on a tract claimed as a homestead are separated from others by the county line does not impair the homestead right: McCracken v. Adler, 98 N. C. 400, 2 Am. St. Rep. 340. As to whether two detached tracts can be held as a homestead, see Hodges v. Winston, 95 Ala. 514, 36 Am. St. Rep. 241; Brandies v. Perry, 39 Fla. 172, 63 Am. St. Rep. 164.

ENDRESON v. LARSON.

[101 Minn. 417, 112 N. W. 628.]

CHATTEL MORTGAGES—Innocent Purchaser.—A purchaser of grain from the mortgagor is not protected as an innocent purchaser by the mere fact that the mortgagee allowed the mortgagor to thresh and sell the grain, when such purchaser had constructive notice by the record of the existence of such mortgage. (p. 633.)

SEED GRAIN NOTE—Second Mortgage—Priorities—Evidence.

A lien attaching to a crop to be grown by virtue of a seed grain note has priority over a lien upon the same crop acquired by means of a previously executed and filed chattel mortgage, and the purchaser of such grain from the mortgagor is entitled, as against the claim of the chattel mortgagee, to pay off such seed grain note. In such case the note and evidence of its payment are admissible in evidence. (p. 634.)

MORTGAGE to Secure Seed Grain Note, Necessity for Preceding Delivery of the Grain.—A seed grain note is not void for the reason that the grain was not delivered at or before the execution of the note, if the note was made pursuant to a contract by which the payee was to furnish the seed and it was delivered to the maker shortly thereafter. (p. 636.)

MORTGAGE OF CHATTELS—Misapplication of Proceeds of Sale of Another Mortgage to Secure the Same Debt.—Where a real estate mortgage is given to secure two notes, one of which is also secured by a chattel mortgage, and the former mortgage is foreclosed and a sale made thereunder, after which the chattel mortgage is foreclosed and a sale made under it, the title of the purchaser cannot be avoided by a third person on the ground that under section 4465, Revised Laws of Minnesota, the proceeds of the sale under the real estate mortgage ought to have been first applied to the satisfaction of the note secured by the chattel mortgage. (p. 637.)

Wilson & Mercer, for the appellant.

F. W. Murphy and T. Kneeland, for the respondent.

418 LEWIS, J. Action in conversion to recover the value of about five hundred bushels of wheat raised by one Larson during the season of 1905 on eighty acres of land in Wilkin county, upon which respondent held a chattel mortgage. The answer is a general denial. The chattel mortgage was dated December 8, 1904, and given to secure a promissory note of \$300, of the same date, payable October 1, 1905, and another note of \$392.91, of the same date, payable October 1, 1906.

At the trial, the mortgage and the \$300 promissory note were introduced in evidence. Respondent, testifying in his own behalf, stated that he resided about thirty miles from the land on which the crop was grown, and that he expected the note to be paid out of the grain on which he held the mortgage. Upon cross-examination he was asked the following questions, among others of like import:

“Q. Then it was your expectation that he would sell the crop and pay you your money on the mortgage?

“Q. Was it your intention that he should dispose of the crop and then pay his mortgage to you?

“Q. You did not take it, or the mortgage securing it, and go to this farm to look after the crop on the farm, did you?

“Q. Did you send the note or mortgage to anybody in this county, or to anyone at all, at the time the note fell due for collection?”

Objection to these questions was made, and sustained, upon the ground that the same were not proper cross-examination and immaterial.

Appellant claims that since the note introduced in evidence matured October 1, 1905, and the grain was not attached until October 14th, it was entitled to show, upon cross-examination, that respondent knew there was no barn or granary on the mortgaged land wherein to store the grain, and that no provision had been made for taking care of it; knew there were public elevators within a few miles, where in it was customary to deposit grain when threshed; knew that the mortgagor had no other way to pay the indebtedness, except by a sale of the mortgaged crop; and knowing that, if delivered by Larson at an elevator, the wheat would become mingled with other wheat, appellant contends **419** that it fol-

lows, from all of these circumstances, if established, that respondent, as mortgagee, had consented that the mortgagor thresh and deliver the grain to the elevator of appellant at Doran. In support of these propositions we are cited to *Hogan v. Atlantic Elevator Co.*, 66 Minn. 344, 69 N. W. 1, and *Partridge v. Minnesota & Dakota Elevator Co.*, 75 Minn. 496, 78 N. W. 85.

Even if permissible to establish this sort of a defense by cross-examination, the facts admitted and sought to be proven would not warrant the implication that the mortgagee constituted the mortgagor his agent for the purpose of disposing of the wheat, and thus relieve appellant from responsibility in receiving it from the mortgagor without inquiry as to the rights of the mortgagee. A purchaser of mortgaged grain from the mortgagor is not permitted to set up the defense that he was an innocent purchaser, simply because the mortgagee did not take proper precautions to protect himself. In the cases cited the facts are so entirely different as to have no application.

2. As a defense, appellant undertook to show that it had paid off a seed grain note of \$121.25, given by Larson for one hundred and five bushels of seed grain which was sown on the land in question, and which seed produced the crop upon which respondent claimed a chattel mortgage. The seed grain note was dated March 23, 1905, and ran to the Merchants' State Bank at Breckenridge, Minnesota.

According to the testimony of the bank officers it was executed in pursuance of an agreement between Larson and the bank that they would furnish him the seed grain; that, not having the grain on hand, Larson executed the note with the expectation, pursuant to arrangement, that the bank would cause the wheat to be delivered to him at the Doran elevator, a few miles distant. An order was issued to appellant elevator company at Doran to deliver the wheat to Larson, and in pursuance of such order the wheat was actually delivered to Larson and to his sons. The agent of the elevator company testified that the wheat was hauled away by Larson and his sons; that he afterward saw the wheat, or wheat just like it, on Larson's farm; that Larson had no other seed wheat for that season; that it was hard wheat, and that there was none other like it in the country, and it was the same kind as delivered by Larson to the elevator after threshing in the fall. During the examination of the agent it developed that

the order issued by the ⁴²⁰ bank to appellant for the delivery of the wheat to Larson was in writing, and the court struck out all testimony which was in conflict therewith as not being the best evidence, and refused to receive the note in evidence. It was further shown by appellant that out of the wheat delivered to it by Larson in October, 1905, appellant paid the amount of the seed grain note to the Merchants' State Bank at Breckenridge, by issuing a check of \$115.15 upon the Bank of Doran to the order of Larson, which check Larson indorsed and delivered to the Breckenridge bank. Appellant offered the check in evidence for the purpose of showing the payment, but the court refused to receive it upon the ground that it had not been properly identified. Appellant also offered in evidence an assignment of the seed grain note executed by the Merchants' State Bank at Breckenridge upon receiving the amount due thereon.

The note and check were properly identified and admissible in evidence for the purpose of establishing the fact that the note was a first lien and that appellant had paid it. It is not very material whether the assignment to appellant of the note had the effect of actually transferring the title from the State Bank of Breckenridge. This action was brought against appellant for the conversion of wheat upon which respondent held a mortgage, and if the seed grain note was a first lien upon that wheat it is immaterial to him how it was paid, whether directly by appellant or by the mortgagor Larson. Being a first lien, respondent has no claim against appellant simply because it utilized enough of the wheat to extinguish the debt. "A lien arising upon a crop by virtue of a seed grain note . . . has priority over a lien upon the same crop acquired by means of a previously executed and filed chattel mortgage": *McMahan v. Lundin*, 57 Minn. 84, 58 N. W. 827. And a chattel mortgage upon a crop not yet planted or sown attaches only to such interest which the mortgagor has on the crop when it comes into being: *Simmons v. Anderson*, 44 Minn. 487, 47 N. W. 52. The evidence was sufficient to go to the jury upon the question whether or not the seed wheat was delivered by appellant company to respondent Larson and sown on the premises. It does not appear clearly from the rulings what portions of the evidence bearing upon this question were struck out by the trial court; but the court instructed the jury that if the wheat grown on the premises during 1905 was delivered to appellant at Doran,

and by it converted to its own use, then respondent was ⁴²¹ entitled to recover the value of the wheat to the amount of Larson's indebtedness to it, not exceeding the amount of the note. Therefore, it is quite clear that it was the intention of the trial court to remove from the jury all consideration of the seed grain note. In this the court was in error.

Respondent relies on the case of *Kelly v. Seely*, 27 Minn. 385, 7 N. W. 821, for the rule that the seed grain note in question was void for the reason that the grain was not delivered before or at the time of the execution of the note. In that case a seed grain note was executed for \$250 in payment of two hundred and fifty bushels of seed wheat, and it appeared from the evidence that only one hundred and fifty bushels were delivered at the time of the execution of the note. The other one hundred bushels were not furnished at all by the payee, but sixty bushels were furnished by a third person at a price less than stated in the body of the note. The 1894 statute was modified by Revised Laws of 1905, section 3479: "To secure a loan or purchase of seed grain, the person receiving the same shall execute to the vendor or lender a note or contract containing a statement of the amount and kind of seed, and the terms of the agreement relative thereto. Upon filing the same or a copy thereof, as hereinafter provided, said vendor or lender shall have a lien on the crop grown therefrom." The former statute (Gen. Stats. 1894, sec. 4155) stated: "The party . . . may at the time of receiving such seed, give a note," etc. The transaction under consideration occurred before the law was modified, and hence the Revised Laws have no application, except to indicate the undoubted tendency in the legislative mind to relax from the strict construction applied in *Kelly v. Seely*, 27 Minn. 385, 7 N. W. 821. The reason given for this rule was: "The purpose of the statute being to give the person furnishing the seed lien upon the crop grown therefrom, as against the creditors of the owner of the crop and persons purchasing of him, it may fairly be conjectured that the legislature intended to prevent the privilege thus accorded to the parties to the note or contract from being used as a cover for fraud. They therefore required that the note or contract should be founded upon an actual delivery of seed, and not upon a promise to deliver it; in other words, that it should be founded upon actual value received."

422 In *Wallace v. Palmer*, 36 Minn. 126, 30 N. W. 445, the seed grain note was held invalid, for the reason that the grain which it purported to secure was not sown upon the premises until the ensuing year, and *Kelly v. Seely*, 27 Minn. 385, 7 N. W. 821, was cited as authority. There was certainly no occasion to refer to the doctrine of the former case for authority to sustain the latter. In *Nash v. Brewster*, 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409, the wheat for which the seed grain note was given was in possession of the vendor at the time of executing the note, but had not been set apart from other wheat, and the claim was made that the seed was not furnished for that reason. The court referred to *Kelly v. Seely*, 27 Minn. 385, 7 N. W. 821, but held that title passed as between the parties, no question being raised as to their good faith. In *Warder-Bushnell & Glessner Co. v. Minnesota & Dakota Elev. Co.*, 44 Minn. 390, 46 N. W. 773, after referring to the preceding case, the court said: "But, by requiring that the grain must be furnished by the one and received by the other party to the note or contract, it should not be understood that he who furnishes must in every instance have actual, visible possession of the grain, or that he must carefully measure it out and make a manual delivery thereof to the purchaser or borrower."

From these cases it will be noticed that the court gradually became impressed with the fact that the rule announced in *Kelly v. Seely*, 27 Minn. 385, 7 N. W. 821, was too strict for universal application, and that in such transactions it was not practical in all cases to require that the wheat be delivered before, or contemporaneous with, the execution of the note and delivery of the wheat. It will be further noticed that in the two last cases referred to the court recognizes the principle that as between the parties the title will be considered to pass constructively upon the execution of the note, although the transaction was not completed, and the title finally passed until delivery of the grain. We therefore hold that the execution of the note on the 23d of March, pursuant to a contract by which the bank was to furnish Larson one hundred and five bushels of seed wheat, and the delivery of the same to him shortly thereafter, constituted one transaction, valid as between the parties to it, and upon delivery of the wheat title in the bank became complete, and, in the absence of fraud, respondent cannot question its validity.

3. Appellant presents as newly discovered evidence the following statement of facts which he claims could not with reasonable diligence ⁴²³ have been discovered at the time of the trial: A payment of \$17 was indorsed upon the back of the \$300 note, which respondent introduced as evidence of his debt. The fact of this indorsement led to the inquiry by appellant's counsel as to its meaning, and it was disclosed there had been a previous foreclosure of a real estate mortgage which had been given to secure the same notes. Appellant now claims as a ground for a new trial that at such real estate foreclosure proceedings the premises were sold in one tract, and upon default of payment of the first note, and before the second note was due, the proceeds, under the provisions of section 4465 of Revised Laws of 1905, should have been used in payment of the first note, and for that reason the note in question was paid and satisfied. We are clearly of opinion that the point is not well taken, for the reason that the statute mentioned is merely for the benefit of the mortgagor and the mortgagee, and the irregularity, if any, in applying the proceeds in payment of the second rather than the first note did not in any way invalidate the foreclosure proceedings. In any event a debt remained to the extent of \$324, and it does not concern appellant that the second rather than the first note was canceled.

A new trial is granted, unless, within twenty days from notice of the filing of the remittitur in the trial court, respondent serves notice of his intention to accept a modification of the verdict by deducting therefrom the amount paid by appellant to cancel the seed grain note, with interest.

The Mortgagor in a Recorded Mortgage of a growing crop, if left in possession after it is harvested, possesses a beneficial interest in the property until foreclosure, and may pass a good title to one who purchases in good faith in open market without actual notice of the mortgage: *Gillilan v. Kendall*, 26 Neb. 82, 18 Am. St. Rep. 766.

CITY OF ST. PAUL v. SCHLEH.

[101 Minn. 425, 112 N. W. 532.]

MUNICIPAL CORPORATIONS—Ordinance Relating to Lumber-yards and Woodyards—Uncertainty.—An ordinance relating to lumber-yards and woodyards and prohibiting the location and operation of a woodyard, “within one hundred and fifty feet of any inhabited portion of any residence district, without first securing the consent and permission of the common council so to do,” is void for uncertainty and indefiniteness. (p. 640.)

Manahan & Cannon, for the appellants.

J. C. Michael and M. Doran, Jr., for the respondent.

426 LEWIS, J. Among the charter powers conferred upon the common council of the city of St. Paul is the following: “To regulate the place and manner of weighing and selling hay, the measurement and selling of firewood, coal, and lime, and to appoint suitable persons to conduct and superintend the same.”

Under this grant of power the council enacted the following ordinance:

“An Ordinance Relating to Lumber-yards and Woodyards.

“The common council of the city of St. Paul do ordain as follows:

“Section 1. That hereafter no person, company or corporation shall establish, maintain and conduct any lumber-yard or woodyard within one hundred fifty feet of any inhabited portion of any residence district, without first securing the consent and permission of the common council so to do.”

Section 2 declared a violation of the ordinance a misdemeanor, and provided a fine not to exceed one hundred dollars for each offense.

The complaint charged that in violation of the terms of the ordinance appellants maintained a woodyard in block 20 of Moss' Outlots to the city of St. Paul, without first securing the consent and permission of the common council, block No. 20 being then and there located within the residence district of the city of St. Paul, and such woodyard being then and there less than one hundred and fifty feet from the dwelling-house commonly known and designated as No. 657 Selby avenue. The complaint was demurred to upon the ground that it did not state facts sufficient to constitute a public offense. Demurrer overruled, and the cause went to

trial. Appellants were convicted, and it was adjudged that they pay a fine of ten dollars, and on default be imprisoned in the workhouse of the city of St. Paul until the fine should be paid, not exceeding the term of ten days each. Appeal was taken to this court from the order overruling the demurrer, and also from the judgment entered in the court below.

Although conducting a woodyard is recognized as a perfectly legitimate business, yet, like other kinds of occupations in themselves lawful, ⁴²⁷ it may become objectionable by reason of the manner and place of conducting the same. It is quite evident that woodyards, if permitted to be operated in all parts of the city without restriction, might become public nuisances, and so come within the class of occupations which may, in the wisdom of the legislature, be regulated under the police power, and with that in view it is quite as important to prevent their location within certain districts as it is to abate them after becoming established. If the measures adopted in this ordinance have the tendency to regulate and prevent such business from becoming a nuisance, the courts will not assume to determine whether such regulation is wise, or the best that might have been adopted: *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498.

According to the facts in this case, appellants, without applying for license from the city council, located and operated a woodyard on block 20, bounded on the south by Selby avenue, east by Dale street, north by Dayton avenue, and on the west by St. Albans street. On the south half of the block, and fronting on Selby avenue, are fourteen business places and one residence, and there are five or six residences on the north side of the block fronting on Dayton avenue. At the trial the state proceeded upon the theory that the inhabited portion of a residence district within the meaning of the ordinance should be determined by taking the woodyard as the center and strike a circle with a radius of one hundred and fifty feet. If a majority of the houses within the circle are residences, then the woodyard is within one hundred fifty feet of the inhabited portion of a residence district. According to the evidence, the one hundred and fifty feet would reach across Selby avenue and take in a considerable number of residences on that side, and also one or two on the opposite side of Dale street and a portion of those fronting on Dayton avenue. If, however, block 20 is considered a district by itself, then the proportion was sixteen business places to

seven or eight residences. It will be noticed that the complaint charged appellant with maintaining the woodyard within one hundred and fifty feet of a particular residence located in block 20 and fronting on Selby avenue.

Appellants claim that the ordinance is void because of uncertainty, for the reason that "residence district" is not defined, and that it is impossible to determine what is meant by "inhabited" portion of a residence ⁴²⁸ district. In a general sense the residence portion of the city of St. Paul may be distinguished from the central business section; but it would be a difficult matter to locate any definite line between the business and residence sections. There are many business sections within the general residence district, and, as developed in this case, nearly the entire frontage of a block on a particular street is devoted to business. If it be conceded that the common council, in enacting this ordinance, had in mind the general outlying residence portion, as distinguished from the central business portion, of the city, then it is uncertain what is meant by the inhabited portion of such residence district. Does this mean within one hundred and fifty feet of any house occupied as a residence? Such seems to have been the idea of the state in drawing the complaint. Or does it mean that territory, embraced within a circle the diameter of which is three hundred feet, wherein the majority of the houses are residences? Such seems to have been the position of the state at the trial. Or does it mean a block, or ward, or some other division? We are of the opinion that appellants' objection to the ordinance upon the ground of uncertainty and indefiniteness is well taken, and that it is void for that reason.

Order reversed.

Municipal Ordinances regulating the location of dairies (St. Louis v. Fischer, 167 Mo. 654, 97 Am. St. Rep. 614), livery-stable keepers (Chicago v. Stratton, 162 Ill. 494, 53 Am. St. Rep. 325), slaughterhouses (Portland v. Meyer, 32 Or. 368, 67 Am. St. Rep. 538), laundries (Ex parte Sing Lee, 96 Cal. 354, 31 Am. St. Rep. 218), and other business places of a more or less objectionable character, are generally regarded as constitutional if reasonable and definite in their terms.

UNION NATIONAL BANK OF COLUMBUS v. WINSOR.

[101 Minn. 470, 112 N. W. 999.]

BANKS AND BANKING—Discount of Note—Bona Fide Holder.—If a bank discounts paper for a depositor and gives him credit upon its books for the proceeds thereof, it is not a bona fide holder for value so as to be protected against infirmities in the paper, so long as no part of the deposit is drawn or the balance of the account exceeds the proceeds of the discounted paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. (p. 642.)

C. A. Dickey and G. C. Stiles, for the appellant.

Reynolds & Roeser, for the respondent.

⁴⁷⁰ ELLIOTT, J. The Union National Bank of Columbus, Ohio, brought an action against Samuel Winsor and eleven other persons to recover the sum of \$840 and interest thereon, alleged to be due upon a certain promissory note dated June 11, 1902, due July 1, 1905, signed by the defendants, payable to McLaughlin Brothers, and by said payees claimed to have been transferred, sold and assigned for a good and valuable consideration to the bank before maturity. The answer denied that the bank was a bona fide purchaser of the note for value before maturity, and alleged that the note was obtained by McLaughlin Brothers through fraud and false representation. When the case came to trial it was conceded, for the purposes of a motion to direct a verdict in favor of the plaintiff on the ground that it was a bona fide purchaser of the note for value, that the note was obtained by fraud, and that as between McLaughlin Brothers and defendants a defense existed, or at least that the evidence was such as required the issue to be submitted to the jury. ⁴⁷¹ The court directed a verdict for the plaintiff on the ground that the undisputed evidence showed that the plaintiff bank purchased the note in good faith before it became due and paid therefor the sum of \$840. The appeal is from an order denying the defendants' motion for a new trial.

The question is whether the evidence required the court to direct a verdict in favor of the plaintiff. McLaughlin Brothers were dealers in horses, and through their agents sold a stallion to the appellants. The note upon which this suit was brought was one of three given as a consideration for a horse. McLaughlin Brothers, who resided in Ohio, assigned

and delivered the note to the Union National Bank of Columbus. It appears that the bank took the note in good faith without knowledge of the fraud; but it also appears that the bank paid McLaughlin Brothers nothing for the note. John R. McLaughlin, a member of the firm of McLaughlin Brothers, testified that he sold the note to the Union National Bank and that the money received therefor was placed to the credit of McLaughlin Brothers. The cashier of the bank testified as follows:

“Q. How much, if anything, did the bank pay McLaughlin Bros. for this note? A. Eight hundred forty dollars.

“Q. How was this amount paid? A. It was credited to their account in the ledger. . . .

“Q. You may state from your personal knowledge, if you can, how soon after credit was given to McLaughlin Bros. for this note that they drew the money out of the bank? A. The only answer I could give to that question would be that all of the deposits of McLaughlin Bros. are checked out from time to time in the regular course of business. This, as all others, was checked out in the regular course of business.

“Q. Can you state what their balance was on April 24, 1905? A. Yes, I can; \$19,002.66 is the amount of their balance after this credit was given them on April 24, 1905.

“Q. Can you state from your personal knowledge what their balance was on July 1, 1905? A. Six thousand nine hundred and twenty-seven dollars and sixteen cents.”

It does not appear that the account of McLaughlin Brothers was at any time less than the sum last mentioned. This does not show that the bank was a purchaser for value.

472 Where a bank discounts paper for a depositor, and gives him credit upon its books for the proceeds of such paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor, and so long as that relation continues and the deposit is not drawn out, the bank stands in the same position as the original party to whom the paper was made payable, even though the bank took the paper before maturity and without notice. By giving credit to the indorser on his deposit account the bank in effect agrees to pay him that amount of money on demand by check or

order, and parts with nothing of value. As long as the amount thus credited remains undrawn by the depositor, the bank, if it receives notice of the fraud, is still in a position to return the note to the depositor and cancel the credit. As said by Mr. Justice Brewer in *Mann v. National Bank*, 30 Kan. 412, 1 Pac. 579: "The proposition rests on the plainest principles of justice, and in no manner impairs the desired negotiability and security of commercial paper. Whenever the holder is a bona fide holder, he has a right to claim protection, but protection only to the extent he has lost or been injured by the acquisition of the paper. If he has parted with value, either by a cash payment, or the cancellation of a debt, or giving time on a debt, or in any other manner, to that extent he has a right to claim protection; but, when he has parted with nothing, there is nothing to protect. A mere promise to pay is no payment. He may rightfully say to the party from whom he purchased, 'The paper you have given me is valueless, and therefore I am under no obligations to pay'; and, if the paper be in fact valueless, payment cannot be compelled. Now, the relation of a bank to its depositor is simply that of debtor. The bank owes the depositor so much. If the deposit is valueless, its obligation to pay is without consideration, and it may decline to pay. There is nothing in the relation of a bank to its depositor which takes its obligation to its depositor out of the general rule of debtor to creditor": *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 309, 37 N. W. 420; *Mann v. National Bank*, 30 Kan. 412, 1 Pac. 579; *Fox v. Bank of Kansas City*, 30 Kan. 441, 1 Pac. 789; *Dreilling v. First Nat. Bank*, 43 Kan. 197, 19 Am. St. Rep. 126, 23 Pac. 94; *Lancaster Nat. Bank v. Huver*, 114 473 Pa. 216, 6 Atl. 141; *Dresser v. Missouri & I. Ry. C. Co.*, 93 U. S. 92, 23 L. ed. 815; *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 244, 14 Sup. Ct. Rep. 94, 37 L. ed. 1063; *Drovers' Nat. Bank v. Blue*, 110 Mich. 31, 64 Am. St. Rep. 327, 67 N. W. 1105; *City Deposit Co. v. Green (Iowa)*, 103 N. W. 96; *Merchants' Bank v. Marine Bank*, 3 Gill, 96, 48 Am. Dec. 300; *Central Nat. Bank v. Valentine*, 18 Hun, 417, and cases cited; *Albany County Bank v. People's C. I. Co.*, 92 App. Div. 47, 86 N. Y. Supp. 773; *Citizens' State Bank v. Cowles*, 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33; 2 Morse on Banks and Banking, sec. 603; 1 Daniel on Negotiable Instruments, 5th ed., sec. 779b; 4 Am. & Eng.

Ency. of Law, 2d ed., 298; 7 Cyc. 929; Randolph on Commercial Paper, sec. 994.

The burden was upon the plaintiff to show that it paid a valuable consideration for the note. This it failed to do. The evidence shows that when the note was discounted the bank was the debtor of McLaughlin Brothers to a large amount, and that the only effect of the discount of the note was to increase the indebtedness by the amount of \$840. So long as McLaughlin Brothers did not reduce their account to less than \$840, the bank was not a purchaser of the note for value. Upon receiving notice of the fraud, it had the right to charge the note to McLaughlin Brothers' account, and leave them to contest the validity of the note with the makers.

The order is therefore reversed, and a new trial granted.

Bona Fide Purchasers or Holders.—If a Bank Discounts a Note before maturity, and places the amount to the credit of the payee, this alone does not constitute the bank a bona fide holder; but if the payee subsequently checks against and exhausts the amount of his credit at the time the note was placed to his account, before the bank has notice of any equities, it will be considered an innocent purchaser for value: *Dreilling v. First Nat. Bank*, 43 Kan. 197, 19 Am. St. Rep. 126. And the mere crediting on a depositor's account by a bank on its books of the amount of a check drawn on another bank, where the depositor's account continues sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course: *Citizens' State Bank v. Cowles*, 180 N. Y. 346, 105 Am. St. Rep. 765.

SECURITY BANK OF MINNESOTA v. PETRUSCHKE.

[101 Minn. 478, 112 N. W. 1000.]

BANKS AND BANKING—Discount of Depositor's Paper—Bona Fide Holder.—If a bank discounts a note for its depositor and gives him credit on its books for the proceeds, it becomes a bona fide purchaser of the note for value so as to protect it against infirmities in the paper, if, before it receives notice of such infirmities, it pays to the depositor or to his order an amount which reduces his deposit to a sum less than was placed to his credit, as the proceeds of the note. (p. 646.)

A. N. McGindley, for the appellant.

Crasweller & Crassweller, for the respondent.

478 ELLIOTT, J. This is an action in which the plaintiff, the Security Bank of Minnesota, sought to recover upon a

promissory note given by Charles J. Petruschke to James Thomson to pay the first premium upon a life insurance policy issued by an insurance company for which Thomson was the general agent, and by Thomson assigned, transferred and delivered before maturity to the Security Bank.

The sole question in the case is whether the bank was a purchaser of the note in good faith, for value, without knowledge of any equities existing between the maker and the payee.

Petruschke claims that under his contract with Thomson he was to receive a policy with premiums estimated upon the assumption that he was twenty-seven years old, although in fact he was twenty-eight years old; that the note in question was for the amount of an annual premium required from a person of twenty-seven years; that a policy was sent him which in this and some other respects did not correspond with the agreement; ⁴⁷⁹ that he returned the policy to Thomson, with a demand that it be made to conform to the actual contract; that Thomson sent the policy back to Petruschke, with the statement that he would have the correction made; and that this agreement was never complied with. Notwithstanding his objections and demands, Petruschke retained possession of the policy. The insurance company accepted the note in payment of the premium (*Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861), and the policy was therefore in force from the time of its delivery. A few days before the execution of this note the agent, Thomson, had opened an account with the Security Bank, and on January 15, 1906, he offered the note in question to the bank for discount. After investigating the financial standing of the maker, the bank accepted the note, which was then duly assigned, indorsed and delivered to the bank, and the full face value thereof was placed to Thomson's credit. It appears that the bank purchased the note before maturity, placed the amount to Thomson's credit, and that the proceeds were checked out and thus actually received in cash by Thomson before the note was due and before the bank learned that there was any defense to the note.

The only question is whether the bank was a purchaser in good faith. The trial court found "that said plaintiff was and is a banking corporation, having a cashier and the usual officers of a bank, and among other things discounted and purchased negotiable paper; that at the time of the purchase of said promissory note said Thomson had an account with said

bank; that the amount of said note, less interest, was credited to his account; that at the time of the maturity of said note all of said account, except a few dollars, had been drawn out; that said plaintiff supposed said note was given for an insurance premium, and had often purchased said paper in the course of its business; that it made inquiry, before purchasing the same, as to the financial responsibility of said defendant; and that plaintiff purchased said note in good faith in the usual course of business without any notice or knowledge of said defect therein or defense thereto, and gave a full and valuable consideration thereof."

480 There is ample evidence to sustain this finding. It is true, as appellant claims, that the mere discounting of a note by a bank for a customer and the placing of the proceeds to the customer's credit, so as to create the relation of debtor and creditor, does not make the bank a holder for value, so as to protect it against infirmities in the paper. But if the bank, before it receives notice of such infirmities, pays to the depositor, or to third parties upon his order, an amount which reduces his deposit to a sum which is less than what was placed to his credit as the proceeds of the note, it then becomes a holder for value to the same extent as though the full amount had been paid when the note was discounted: *Union Nat. Bank of Columbus v. Winsor*, 101 Minn. 470, ante, p. 641, 112 N. W. 999, and cases there cited. That is what was done in this case.

The evidence did not show that this note was obtained by fraud. Petruschke did not get exactly the policy which he expected, and which Thomson promised to obtain for him. It is possible that he could have had the contract reformed, or he could have rescinded the contract; but he did nothing of the kind. He retained the policy, notwithstanding his negotiations with Thomson, and received insurance which presumptively constituted a full consideration for the note. The circumstances were not such as to cast the burden upon the bank which it would be required to bear if the note had its inception in actual fraud. There is nothing even to suggest that the bank was not a good-faith purchaser. It discounted the note for a customer in the ordinary course of business, and the effect of the cashier's testimony is that it had no knowledge of any defense which Petruschke may have had against Thomson.

The order of the trial court is therefore affirmed.

Bona Fide Holder.—For authorities on the principle involved in the principal case, see *Union Nat. Bank v. Winsor*, 101 Minn. 470, ante, p. 641, and cases cited in the cross-reference note thereto.

MANTORVILLE RAILWAY AND TRANSFER COMPANY v. SLINGERLAND.

[101 Minn. 488, 112 N. W. 1033.]

EMINENT DOMAIN—Special Benefits.—The term “special benefits” as used in railway right of way condemnation proceedings has the same meaning and is governed by the same rules as when employed in highway drainage or municipal improvement proceedings only in so far as private property is taken for a public use by such proceedings. (p. 650.)

EMINENT DOMAIN—Special Benefits—Setoff.—Special benefits may be set off in railway right of way condemnation proceedings against the value of the part taken, and damages to the remainder. (p. 653.)

EMINENT DOMAIN—Special Benefits—Setoff.—Special benefits to be set off in railway right of way condemnation proceedings must be pro tanto a fair equivalent for the land parted with and the damages inflicted. They must be special, not common; direct, not consequential; substantial, not speculative; proximate, not remote; actual, not constructive. (p. 653.)

EMINENT DOMAIN—Special Benefits.—The usual beneficial results to the public and to a railway company having the right to exercise the power of eminent domain arising from the construction and operation of the road are not special benefits. (pp. 653, 654.)

EMINENT DOMAIN—Special Benefits—Increased Facilities for transportation of natural products at reasonable rates arising from the construction of a railroad are not special benefits or legal tender for parts of land of private owners taken under the power of eminent domain and for damages to the remainder. (p. 654.)

EMINENT DOMAIN—Special Benefits—Setoff.—Enhancement of the value of land arising from the construction of a railroad, standing alone, is not a special benefit to it. A benefit is special only when the road is so constructed as to give the land, a part of which is taken under the power of eminent domain, an increased value above the general appreciation of property in the neighborhood. Mere general appreciation, consequent on projected or actual construction of the road, cannot be set off against damages for the taking of the land. (pp. 654, 655.)

EMINENT DOMAIN—Special Benefits.—That “benefits to land,” a part of which is taken for a railway under the power of eminent domain may be deducted, they must be special and local to the land, and such as result directly to the particular tract, a part of which is taken. (p. 655.)

EMINENT DOMAIN—Special Benefits.—The mere increase of transportation facilities and the prospective feasibility of connecting industrial works upon a tract of land, a part of which is taken by

a railroad under the power of eminent domain for a right of way, are not ordinarily sufficient to constitute special benefits, at least where the land owner cannot by law compel the railroad company to furnish him with particular facilities. (p. 658.)

EMINENT DOMAIN—Special Benefits.—The probability that the railroad company will construct or maintain stub tracks, or permit switch connections whereby a land owner's quarries will make his land valuable, is not a special benefit to be set off against the value of the part of his land taken by the railroad company for a right of way under the power of eminent domain, or as against damages to the remainder. (p. 659.)

G. A. Norton and S. Lord, for the appellant.

B. T. Willson and C. C. Willson, for the respondent.

⁴⁸⁰ **JAGGARD, J.** In 1896 the plaintiff and appellant railway company, on notice to defendant and respondent, presented its petition to the district court, describing the route of its proposed railroad and the land of defendant it desired to appropriate, and asked the appointment of three commissioners to appraise damages. The commissioners, duly appointed, appraised defendant's damages at five hundred and seventy-five dollars, and in 1896 filed their report. Both parties appealed from the award. The company gave the statutory ⁴⁰⁰ bond, took possession of the land, and constructed its railroad over it. The proceedings on appeal were continued from time to time until 1906, when they were tried. The jury returned a verdict in favor of defendant for one thousand and fifty dollars. This appeal was taken from an order of the trial court denying plaintiff's motion for a new trial.

The assignments of error are addressed to the rulings of the trial court in excluding evidence of special benefits to the land, due to the facts that the road was constructed along the only feasible route to reach two stone quarries on defendant's premises, part of which premises were taken for the right of way, and that without the road the lands were of no value for quarrying or commercial purposes, but with the road, constructed as it was, the quarries were worth over fifteen hundred dollars. The defendant insists that this testimony was directed to show the value of the two stone quarries on his premises, both of which were opened and operated at a time long subsequent to the commencement of these proceedings, the taking of the lands, and the construction of the road by the company, and that the testimony did not tend to show benefits to the defendant's land at the time at which the

benefits to the defendant's land at the time at which such benefits are to be determined according to law: *Sherwood v. St. Paul etc. Ry. Co.*, 21 Minn. 122; *Warren v. First Division etc. R. Co.*, 21 Minn. 424; *Whitacre v. St. Paul etc. R. Co.*, 24 Minn. 311. See, however, *Morin v. St. Paul etc. Ry. Co.*, 30 Minn. 100, 14 N. W. 460; 18 Century Digest, "Eminent Domain," secs. 325-402. Construing the assignments of error and the record on which they are based with the liberality required by current appellate practice, we are of the opinion that the appeal is sufficient to present the merits of the controversy.

The essential question upon the merits is whether the court erred in holding that there were no special benefits available as a setoff shown or offered to be shown in this case. Plaintiff's argument upon the facts was that defendant's lands, having stone quarries upon them, must have been specially benefited by the building of a railroad across his property so near to the quarries that they could be easily reached. While it recognizes that at the time of taking the lands the railroad could not have been compelled to build a spur track, this, it insists, did not deprive the road of the right to deduct the value of the special benefit. "Railroads are built, among other things, to carry freight. Stub roads . . . are built, as a rule, for the very purpose of reaching ⁴⁹¹ quarries, factories, mills, mines, and the like. And the fact that they are built for such purposes makes it reasonably certain that they will furnish necessary connections and switches."

In support of and in opposition to this contention we are referred to many decisions, which counsel for the respective parties have collated with industry and classified with ingenuity. These decisions, the authorities therein referred to, and others which we have examined, reproduce many shades of opposing opinion. Frequently little heed has been paid in these opinions to the nature of the proceeding under which the question has arisen and to the subject matter to which the benefits pertained. Much of their lack of harmony is due, also, to the failure to observe the varying rules adopted by the various jurisdictions with respect to whether either, neither, or both general and special benefits, may be used as a setoff, and whether such counterclaims avail as to either, neither, or both, the value of the part taken and damages to the remainder. There is observable in these authorities a general inclination to deduce the rule from the term "special

benefits," and to treat that phrase as if it were feasible from it to determine, a priori, by reasoning of mere nominalists, how the owner of property shall be compensated for what part of his estate has been taken by power of law. Under the circumstances, it is desirable (1) to distinguish between the varying proceedings and subject matter involved in each, respectively; (2) to advert to fundamental principles, and to note the pertinent rules of law adopted in different jurisdictions; and (3) to reach a conclusion in this case with regard, not to the phrase "special benefits," but to the substance of the actual conditions of fact presented by this record.

1. The term "special benefits" is used indiscriminately, as if its meaning were identical in cases of judicial highways and ditches, assessments for local improvements, and in condemnation proceedings. There are, however, substantial, but neglected, distinctions arising from the nature of these proceedings and the subject matter to which they apply. The primary basis of distinction is that in condemnation proceedings only is part of the land invariably taken by eminent domain. It may or may not happen that highway, drainage or municipal improvements include this exercise of that sovereign power of the state. It is only when this occurs that the term "special benefits" has exactly the same meaning, and that the identical principles apply to it as when ⁴⁹² employed in proceedings to condemn a right of way by a railway company: See *Arbrush v. Town of Oakdale*, 28 Minn. 61, 9 N. W. 30.

Another distinction is this: Of these cases, a railway company only secures lands for a public use for which the public is subsequently required to pay. When abutting property is charged for the construction of a sewer, a street, a sidewalk, a drain or a ditch, or when property within a district is assessed for a park, a boulevard, a fill or the like, no subsequent charge is made for use. It is true, however, that a water frontage assessment may be levied and a subsequent water rate be collected for water furnished; but even here no direct charge is made for incidental fire protection.

Another distinction is to be found in the accessibility of the improvement. When, for example, a street is opened through a man's property, he has, subject to reasonable regulation, instantaneous and immediate access to and egress from his property at every part of the street. Practically every other municipal improvement, and judicial highways

and ditches, confer upon abutting owners similar privileges. In all such cases the right so conferred may be enforced by process. When a railroad, however, is constructed through a man's property, he may or may not have access to it at particular places. It is a question, in the first place, of statutory provision, and in the second place of fact, whether he can secure the exercise of discretion on the part of public officers in ordering the construction of a spur track, the furnishing of switch connections, or the location of a station. Under no circumstances is his privilege in this regard at all analogous to the complete, if not absolute, right of property owners to enjoy municipal improvements for which they have been assessed.

The final distinction is this: The ordinary local assessments are made by the administrative branch of the government, and the rights of the court to control them are limited in the extreme. The emphasis placed on the power of the executive to determine questions of benefits which may be charged to property owners, entirely free from judicial interference, which was given by the decisions of the federal supreme court practically overruling *Village of Norwood v. Baker*, is recent and impressive. Condemnation proceedings and the current drainage and highway proceedings are judicial. It is accordingly within the power of the courts in such proceedings, in a measure at least, to prevent the practical confiscation of private property by a mere resolution of ⁴⁹³ an official or of an official body, determining that a given improvement has conferred special benefits upon the owners thereof in an amount found. This the executive branch of the government has the power to do; and, as sad experience shows, this power it constantly exercises. The courts, under the doctrine in force at present, may relieve in extreme cases only, if at all: *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879. In judicial proceedings, however, a consistent and a visible effort has been made to prevent plunder of land owners through the device of merely constructive benefits: *Swenson v. Board of Supervisors*, 95 Minn. 161, 103 N. W. 895. The analogy of the judicial highway and ditch proceedings may accordingly be somewhat closer to railway condemnation than that of the ordinary local assessment.

We conclude that "special benefits," as defined in these allied proceedings, bears an analogy to "special benefits" in

railway condemnation proceedings, but an analogy which is often remote, and which is likely to be misleading. The authorities of this kind to which we have been referred by plaintiff do not aid in the solution of the present problem. It is unnecessary to discuss them in detail.

2. The various courts, starting with essentially the same premises, have reached very different rules for the determination of what is a special benefit in railway condemnation proceedings, and have varied still more in the application to the facts presented of the formulae which they have adopted. The common premises are the constitutional provisions of which those of this state are typical. Private property "shall not be taken for public use without just compensation": Minn. Const., art. 1, sec. 13. "In all cases, however, a fair and equitable compensation shall be paid for such land and the damages arising from the taking of the same": Minn. Const., art. 10, sec. 4. Under similar constitutional provisions, it is the law of many jurisdictions that the land taken must be paid for in money, and cannot be paid for in mere "benefits." The argument in that connection is nowhere better stated than by Wilson, C. J., dissenting, in *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 392 (515), 83 Am. Dec. 100: "If the legislature has the right, under our constitution, to say that a party may be compensated for his land taken for public use in 'benefits,' it may also say that he may be compensated in oxen, sheep, provisions, or ⁴⁹⁴ tobacco, or in any other useful or useless thing. Either they have no power, or unlimited power, to designate the currency or commodity in which payment may be made. To my mind it seems clear that the constitution, properly interpreted, gives them no power in the premises. When the public or a corporation takes the property of an individual, it becomes indebted to him for its value, and should pay that debt in that which, by the law of the land, would be deemed a lawful tender in payment of any other debt."

Quite generally, however, courts have recognized the propriety of allowing benefits conferred as a setoff. Mr. Lewis has thus arranged the different jurisdictions with respect to the rule in force in each respectively: "1. Where special benefits may be set off against damages to the remainder, but not against the value of the part taken; 2. Where benefits, whether general or special, may be set off as in the last

proposition; 3. Where special benefits may be set off against both damages to the remainder or the value of the part taken; 4. Where both general and special benefits may be set off as in the last proposition."

The decisions of this state put it in the third of these classes: Lewis on Eminent Domain, p. 1000, sec. 465.

With respect to the nature of the benefit which may be used as a setoff, there is a general consensus of opinion that the benefit must be pro tanto a fair equivalent for the land parted with and the damages inflicted. Various adjectives are currently used to define the character of these benefits. They must be special, as distinguished from common (*Weir v. St. Paul etc. R. Co.*, 18 Minn. 139 (155); 18 Century Digest, "Eminent Domain," sec. 390 et seq.; 7 Current Law, 1294); actual, as distinguished from constructive (*Swenson v. Board of Supervisors*, 95 Minn. 161, 103 N. W. 895); substantial, as distinguished from speculative (*Whitely v. Mississippi W. P. & Boom Co.*, 38 Minn. 523, 38 N. W. 753; *Haynes v. City of Duluth*, 47 Minn. 458, 50 N. W. 693; *Metropolitan etc. R. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773); direct, as distinguished from consequential (18 Century Digest, "Eminent Domain," sec. 390); and proximate, as distinguished from remote (*Jeffersonville M. & I. R. Co. v. Esterle*, 13 Bush, 667). These terms represent particular aspects of facts in issue, and serve to show the uniform intention of the courts to prevent the violation of the ⁴⁹⁵ constitution by taking a man's land without pay by mere equivocation and to actually pay him for what he has parted with and for what damage he has suffered.

In order that it should be, in any literal sense, practical compensation, the benefit must be peculiar to the individual, part of whose land has been taken, and not such as accrues to adjacent land owners generally. What advantage has been received by other owners whose lands have not been taken could, by legal juggling only, be considered as payment for lands segregated for railway use. For example, suppose that a railway running through an open country would take part of lands of one set of owners, including, as the chance might be, all improvements of value. Other sets of owners would receive the same general advantages accruing from increased facilities for transportation. All would profit, but only the first set would pay; for the property would be appropriated

and paid for in part by the consequent increase in value which others would receive gratis. "One pays for the other's 'benefit'": *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87. See *Cooley's Constitutional Limitations*, 570; note to *Symonds v. Cincinnati*, 14 Ohio, 147, 45 Am. Dec. 529.

The common benefits from the construction of a railway are the natural sequences of a mutually advantageous arrangement. A railway company is given by the state the right to exist, to enjoy the usual corporate powers, to exercise the extraordinary and sovereign power of eminent domain, and to charge toll for the services it may render to the public. Incidentally in this state it is exempt from ordinary taxation. The railway profits by the exercise of these powers and privileges in the collection of its authorized charges; the public, by the privilege of buying improved transportation at uniform and reasonable rates. That railway company property and stock increase in value, and that the community through which the railway passes finds its lands made more valuable and its prosperity increased, is the accomplishment of the very purposes for which the sovereign state conferred these franchises and privileges upon corporations of this class. It makes no difference whether the advantage to land owners consists in providing an immediate market for their products, agricultural, mineral, or manufactured, or in transporting them to remoter markets. The farmer, who sells grain, hay, stock, or dairy products, the quarryman, who sells building stone or ballast, and the merchant or manufacturer, who may or who may not ⁴⁹⁶ own land, but whose business is made or increased, share in a common advantage which is their lawful due. Increased facilities for transportation of natural products at reasonable rates are not in logic legal tender for part of lands of private owners taken under power of eminent domain and for damages to the remainder.

A tangible estimate of the value of such facilities is in the increased value of the land. Any other means of determination would be speculative in the extreme. It is well settled, beyond dispute, that enhancement of value of land standing alone is not a special benefit. A benefit is special, by any reasonable construction, only when the road is so constructed as to give the land in question an increased value above the general appreciation of property in the neighbor-

hood. Mere general appreciation, consequent on projected or actual construction of the road, cannot, in any view of the case, be set off against damages for the taking of the land; and this is the rule even in Pennsylvania: *Mahaffey v. Beech Creek*, 163 Pa. 158, 29 Atl. 881. And see *Mississippi Ry. Co. v. McDonald*, 12 Heisk. (59 Tenn.) 54; *Southern Illinois v. Stone*, 194 Mo. 175, collecting cases at page 188, 92 S. W. 475; *Tracewell v. County*, 58 W. Va. 283, 52 S. E. 185, 187.

The logic of the situation has led many courts to insist that benefits, to be used as a setoff, in order that they may be special, must alter the physical character of the land. "The benefits to be deducted must be those resulting directly to the land, a part of which is taken, from the construction of the road, not through the vicinity, but through the land": *McMillan, J., in Winona etc. R. Co. v. Waldron*, 11 Minn. 392 (515), 83 Am. Dec. 100, citing many cases. "The benefits to be considered and allowed by the jury, where only a part of an entire tract is taken, are not such as are common to lands generally in the vicinity, but such as result directly and peculiarly to the particular tract in question; as, for instance, where property is made more available and valuable by opening a street through it, or when land is drained or otherwise directly improved": *Vanderburgh, J., in Whitely v. Mississippi W. P. & Boom Co.*, 38 Minn. 523, 38 N. W. 753. The benefit must result from the construction, and not from the location, of the railroad: *State v. Evans*, 3 Ill. 208. "A benefit which may thus be allowed is one which enhances the value of the land affected by it, by improving its physical condition and adaptability for use, such as by reclaiming waste land, ⁴⁹⁷ by draining or flowing a marsh, by aiding in the development of a water power, by dispensing with the necessity of maintaining fences [which is not the law in Minnesota], or by opening a mine or quarry, and the like": *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 364, 18 N. W. 328.

The conclusion of Mr. Pattison, in his excellent article on "Eminent Domain," in 15 *Cyclopedia*, at page 771, is: In order that the benefits may be deducted, they must be special and local, and such as result directly to the particular tract of land of which a part is taken. Among the familiar illustrations of such local benefits are: The drainage of lands (*Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194);

the filling up of an old canal (*Whitman v. Boston*, 3 Allen (Mass.), 133); access to a pond for cattle and ice (*Fitz v. Nantasket & B. R. Co.*, 148 Mass. 35, 18 N. E. 592; *Paine v. Woods*, 108 Mass. 160); the formation of a mill pond by the construction and maintenance of a necessary embankment (*Sullivan v. North Hudson County R. Co.*, 51 N. J. L. 518, 18 Atl. 689); a periodical flooding, likely to add alluvium and enrich land (*Milwaukee & M. R. Co. v. Eble*, 4 Chand. 68, 3 Pinn. 334); construction of a main sewer, making proper drainage of the property traversed less expensive (*Butchers' S. & M. Assn. v. Commonwealth*, 169 Mass. 103, 47 N. E. 599; *Trinity College v. City of Hartford*, 32 Conn. 452).

In the light of these considerations, we come to view the specific cases to which plaintiff refers us to the effect that increased transportation facilities and the feasibility of connecting industrial works upon the tract with the road are "special benefits." Of these *Reading & P. R. Co. v. Balthasar*, 126 Pa. 1, 17 Atl. 518, is especially apt. There a quarry had been opened at a time when a canal was the only available line for its products. The defendant railway company built a road to and across plaintiff's lands. It was held that whether this additional line of transportation was or was not an advantage to the owners of the quarry was a proper subject for consideration by the jury. Therefore, the true inquiry was whether a broader market and better facilities for shipment were put within plaintiff's reach by the building of defendant's road, or in other words, whether there were advantages to be set off against the disadvantages arising from the appropriation of the plaintiff's land for the right of way of the road. So the courts have found special benefits to consist of increased transportation facilities for marketing coal (*Chicago etc. Ry. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931); ⁴⁰⁸ in connection with a mill for the reduction and treatment of ores (*Colorado Cent. R. Co. v. Humphrey*, 16 Colo. 34, 26 Pac. 165); in connection with future manufacturing enterprises (*St. Louis etc. Ry. Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771; *St. Louis etc. Ry. Co. v. St. Louis U. S. Y. Co.*, 120 Mo. 541, 25 S. W. 399); in connection with a situation resulting in the conversion of ordinary land into factory sites (*Hartshorn v. Illinois V. R. Co.*, 216 Ill. 392, 75 N. E. 122).

A number of considerations serve to subtract from the apparent weight of this class of authorities. With respect

to the Pennsylvania cases, it is to be noted, as Mr. Justice Gordon said in *Pittsburgh & L. E. R. Co. v. Robinson*, 95 Pa. 426: "It is conceded that, under our acts of assembly, the owners of mills and manufactories may of right connect their private sidings with the railroads in their vicinity, and though, as the counsel for the defendants in error says, it does not follow that such owners may ever avail themselves of such right, nevertheless the fact that such a right exists in them may largely advance the market value of their several properties. Certainly privileges which may be used to facilitate transportation to and from large factories must have some effect upon their values." No such right existed in Minnesota. While the definition of special benefits formulated in Pennsylvania has been essentially the same as in this state (see *Hornstein v. Atlantic & G. W. R. Co.*, 51 Pa. 87; *Long v. Harrisburg & P. R. Co.*, 126 Pa. 143, 19 Atl. 39), none the less, as Mr. Gould has pointed out: "The measure of damages laid down in these cases would seem to permit general benefits to be set off": 2 Gould on Eminent Domain, 1010, note 17. The New York elevated road cases are not in point, because the rule applicable thereto is that, in estimating benefits resulting from the construction of such a road, not only those peculiar to the premises, but also those shared with neighboring property, should be considered: *Saxton v. New York El. R. Co.*, 139 N. Y. 320, 34 N. E. 728; *Peabody v. Boston El. R. Co.*, 191 Mass. 513, 78 N. E. 392.

Plaintiff also argues from cases which hold that the building of a station near a tract of land confers a special benefit: *Shattuck v. Stoneham B. R. Co.*, 6 Allen (Mass.), 115; *Bohm v. Metropolitan El. Ry. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; *Nette v. New York El. R. Co.*, 1 Misc. Rep. 342, 20 N. Y. Supp. 627; *Pittsburgh & L. E. R. Co. v. Robinson*, 95 Pa. 426; *City of El Paso v. Coffin* (Tex. Civ. App.), 88 S. W. 502. A number of circumstances, part of which are elsewhere herein referred to, peculiar to the individual cases, serve to distinguish these ⁴⁹⁹ authorities more or less clearly from the instant case. In Massachusetts it has been held that, before the station has been in fact established, it could not be determined whether the benefits were of a sufficiently certain character to affect the damages: *Brown v. Providence W. & B. R. Co.*, 5 Gray, 35. The opinion that the building of a station or of an elevator is not a special

benefit, which is that of this court (*Minnesota Cent. Ry. Co. v. McNamara*, 13 Minn. 468 [508]), is the rule also in Illinois (*Illinois I. & M. R. Co. v. Borms*, 219 Ill. 179, 76 N. E. 149), and in Wisconsin (*Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 376, 18 N. W. 328). A number of cases tending to support plaintiff's claim are distinguishable, because the set-off was allowed against damages by inconvenience, or incidental damages only: *Chicago etc. Ry. Co. v. Rottgering*, 26 Ky. Law Rep. 1167, 83 S. W. 584. And see *Union R. Co. v. Raine*, 114 Tenn. 569, 86 S. W. 857. Others, because of the peculiarity of statutory provisions or ordinances: *St. Louis etc. Ry. Co. v. Fowler*, 142 Mo. 67, 44 S. W. 771 (where, under a statute in force at the time of trial, the owner had a qualified right to switching connections). Others, because of the statutory definition of benefits: *Colorado Cent. R. Co. v. Humphrey*, 16 Colo. 64, 26 Pac. 165; *Sexton v. Inhabitants of North Bridgewater*, 116 Mass. 200. *Drury v. Midland R. Co.*, 127 Mass. 571, expressly does not decide that evidence as to the feasibility of putting in a sidetrack on petitioner's land was admissible.

While the cases which are inconsistent with defendant's position may be distinguished more or less clearly from the case at bar, it must, however, be recognized in candor that many of them lend support to plaintiff's contention, and that the defendant can prevail in this case only by disagreeing with them in some measure. As has been pointed out, however, we think that on principle the mere increase of transportation facilities and the prospective feasibility of connecting industrial works upon the tract with a railroad are not ordinarily sufficient to constitute special benefits, at least where the land owner cannot by law compel the railroad company to furnish him with particular facilities.

The more nearly specific authorities agree with the general trend of decisions, previously referred to, in enforcing this rule. We are referred to *Russell v. St. Paul etc. Ry. Co.*, 33 Minn. 210, 22 N. W. 379, as being an authority to the contrary. There is no force in this contention. In that case *Vanderburgh, J.*, said: "The only question is the amount of plaintiff's damages, being in this instance the value of the ⁵⁰⁰ lot in controversy." No question as to benefits, general or special, was there involved. On the contrary, the following advantages have been held not to be proper matter for setoff: The removal of a cemetery (*Minnesota Cent. Ry. Co. v. Mc-*

Namara, 13 Minn. 468 [508]); providing a market for wood or ties (Minnesota Valley R. Co. v. Doran, 17 Minn. 162 [188]); building fences along the right of way (Trogden v. Winona & St. P. R. Co., 22 Minn. 198). In *Arbrush v. Town of Oakdale*, 28 Minn. 61, 9 N. W. 30, this court said, per Mr. Justice Clark, that the only advantages and benefits which can be used as a setoff are such as "are direct and special to the land a part of which is taken. 'The kind of benefit which is not allowed to be estimated for the purpose of being deducted from the damages is that which comes from the claimant's sharing in the common convenience of increased public facilities and the general advance in value of real estate in the vicinity by reason thereof: *Allen v. City of Charlestown*, 109 Mass. 243.' "

So in other jurisdictions it has been held that a special benefit is not made out by the fact that the construction of a railroad opened a market for the owner's coal and wood (*Grafton & G. R. Co. v. Foreman*, 24 W. Va. 662); or that it enabled the shipment and sale of adjacent trees (*Haislip v. Wilmington & W. R. Co.*, 102 N. C. 376, 8 S. E. 926), which are suitable for ties (*Childs v. New Haven & N. Co.*, 133 Mass. 253). In *Romano v. Yazoo & M. V. R. Co.*, 87 Miss. 721, 40 South. 150, it was held: "In an action for damages to property by the construction and operation of a switch track in front of it, evidence of the enhanced value of that property for warehouse purposes by reason of the building of the track was not admissible, the property not being used for such purpose": And see *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 157, 76 Am. St. Rep. 806, 33 S. E. 87.

3. In the case at bar the possibility or the probability that the railroad company would construct or maintain stub tracks or permit switch connections, whereby defendant's quarries would make his land valuable, is not a special benefit to be offset against the value of the part of his land taken by the railway company or damages to the remainder. That benefit accrued to the community in general. It was such a benefit as defendant might have received if the railroad had been constructed through the country, but had not crossed his farm: See *Carli v. Stillwater & St. P. R. Co.*, 16 Minn. 234 (260); *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 392 (515), 83 Am. Dec. 100. If, for example, the railroad⁵⁰¹ company had run along the boundary line of his neighbor's land, that neighbor would have had identical advantages

and would have paid nothing. The defendant is not required to pay in part for the same thing which his neighbor received gratis. The benefit was not direct nor local. The construction of the road did not physically alter defendant's lands to his advantage. It did not open a quarry, as by making a cut and exposing the stone. In this connection it is to be noted that this entire section of the state is underlaid with limestone, whose value is largely determined by its quality. A quarry is not so common as a field, but is of so frequent occurrence that the benefit of transportation facilities accrues to property owners quite generally, and is highly uncertain, if not speculative. The benefit was contingent, and dependent upon the right of the railroad company to permit or refuse direct connection with it. Indeed, it might never accrue in fact. If it existed at all, the benefit was constructive, not actual. Any use the land owner might make of any spur track or switch connection would be "merely permissive, and subject to the paramount right of the railroad corporation": See *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194; *Ranlet v. Concord R. R. Corp.*, 62 N. H. 561. It would be an unjust discrimination against this land owner to require him to pay for the privilege of paying the plaintiff for the transportation of his freight. The trial court was clearly right.

Order affirmed.

In Proceedings to Condemn Land under the power of eminent domain, special benefits accruing to the owner may be set off against his right to compensation: See the note to *Symonds v. Cincinnati*, 45 Am. Dec. 532; *Fort Wayne v. Hamilton*, 132 Ind. 487, 32 Am. St. Rep. 263. But such benefits must be real, not chimerical: *Washington Ice Co. v. Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222. Damages suffered by a lot owner in grading a street to the official grade by a railway corporation cannot be mitigated by proving that he will receive benefit from the construction and operation of its road: *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149. But in estimating damages to a lot and mill thereon from the construction of a railroad in front of it, the increased wholesale trade resulting therefrom may be set off against the loss of local retail trade, in fixing the value of the property: *Guinn v. Ohio River R. R. Co.*, 45 W. Va. 151, 76 Am. St. Rep. 806. General benefits consist in the increase in value of land common to the community generally from advantages which will accrue to the community from the improvement. Special benefits are such as result from the mere construction of the improvement, and are peculiar to the land in question: *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**McGINNIS v. CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY.**

[200 Mo. 347, 98 S. W. 590.]

MASTER AND SERVANT—Liability for Servant's Nonfeasance.—Where a servant negligently fails to do what he should have done, he is not liable therefor to third persons, but his master is. (p. 667.)

MASTER AND SERVANT—Liability for Servant's Misfeasance.—Where a servant negligently does what he should have properly done, both he and his master are liable therefor to third persons. (p. 667.)

MASTER AND SERVANT—Respondent Superior—Exoneration of Servant.—A verdict which exonerates a servant in an action against him and his master for injuries caused by the servant's misfeasance should exonerate the master also. (p. 671.)

M. A. Low, Paul E. Walker and Frank P. Sebree, for the appellant.

Pross T. Cross and John A. Cross, for the respondent.

350 **GRAVES, J.** Action for personal injury. Suit was instituted against defendant, the Chicago, Rock Island and Pacific Railway Company, and two of its employés, Welsh and French. Upon close of plaintiff's evidence the trial court sustained a demurrer to the evidence as to defendant Welsh, but overruled the demurrers of the other two defendants. After the evidence closed the case was submitted to the jury, and a verdict returned in favor of defendant French, but against the defendant company in the sum of ten thousand dollars. Upon this verdict judgment was rendered against defendant company for the said ten thousand dollars and

costs. After unsuccessful motion for new trial, an appeal was duly perfected and taken to this court by the railway company.

³⁵¹ In the petition it is alleged that plaintiff and defendants Welsh and French were employes of defendant railway as members of a gang of bridge carpenters; that defendant Welsh was foreman of the gang; that on the day of the accident—February 6, 1903, they were working near or at the station of Dearborn, Missouri; that defendant Welsh ordered a tool-car to be loaded with some old bridge lumber and after the lumber was placed on the car, ordered some hand-cars to be placed on top of the lumber; that after the cars were placed thereon with wheels down, the defendant Welsh ordered plaintiff and other colaborers to turn them over; that the lumber was so placed on the car as to make the place dangerous to work on; the petition then proceeds as follows:

“That in obedience to said orders and commands of defendant Welsh plaintiff and defendant French took hold of and lifted on the handles of one end or side of one of said hand-cars, and two of said other hands took hold of and lifted on the handles of the other end of said car; that when one side of said car was raised from off said timbers the defendant French while in the line of his duties to defendant railway company, although knowing and seeing plaintiff’s perilous position on the edge of said loaded car, did carelessly, negligently and wantonly let go of his hold on said car and ceased to help plaintiff to hold and lift the same, and wantonly and negligently shoved and pushed said car toward plaintiff, and that on account of all the above said hand-car moved and slid toward and onto plaintiff, and he was, without any fault or negligence on his part whatever, pushed and forced over the side and edge of said loaded car, and onto the ice and frozen ground below, with great force and violence, and permanently injured as hereinafter set out.

³⁵² “That the negligence and wantonness on the part of the defendant was as follows:

“a. That the defendant French, while so helping to lift and hold said hand-car, negligently, wantonly and carelessly pushed and shoved said car onto and toward plaintiff.

“b. That the defendant French, while helping to lift and hold said hand-car as aforesaid, under the said orders and commands of the said Welsh, negligently and wantonly let

go his hold thereon and ceased to hold and help hold said hand-car.

“c. That the defendant Welsh, in the line of his duties to defendant railway company negligently ordered and required plaintiff to get on top of said loaded car to assist in lifting said hand-cars when it was dangerous and unsafe for plaintiff to do so, and this the said Welsh well knew, or could have known by the exercise of ordinary care.”

The petition then described the character of the injuries and alleged damages in the sum of twenty-five thousand dollars.

The separate answer of each defendant was practically the same (1) a general denial, (2) an admission that plaintiff and defendants Welsh and French were members of a gang of bridge carpenters and that plaintiff fell from the car and received slight injuries, but denied the seriousness of the injuries (3) and a plea of contributory negligence. Reply is a general denial.

With the views we have of this case an extended statement of the evidence is not required. Plaintiff, after testifying to his employment by defendant company and that defendants Welsh and French and three others—Ferguson, Kincade and Pardee—were likewise employed on the bridge gang of carpenters, and that Welsh was a carpenter the same as he was, “only he was a straw boss,” described the manner of his injury thus:

“Q. Go ahead, Mr. McGinnis, and in your own ³⁵³ language tell what took place. A. Well, we had a hand-car or push-car for our tools. We had removed some of the bridge timber out of a couple of spans of bridge, and Mr. Welsh come to the conclusion he would load this bridge timber. So we loaded it on our tool-car, as you might call it. It was part boxed, about eight feet boxed and the balance a flat car. We started in to load the timber until it was above the top of the box-car. After we got the timber on Mr. Welsh says, “Now, take hold and run the push-car on top of the bridge timber.” So we fastened the ropes to the rubble-car and pulled it on.

“Q. State your position while putting the car on. A. My position was on the ground with Mr. Welsh. The other men were on top of the car, holding the ropes. We simply pulled it up until it got out of our reach and then Mr. Welsh told me to get on top of the car and help pull it up. I got up and

we helped and then he ordered us to turn it over on its back, turn the wheels up—

“Q. Now, state the position of the rubble-car on top of this bridge timber. Did it set crossways or lengthways?

A. Crossways, just as it come up.

“Q. Go ahead and state what you done. A. After we got it up there we all got around it. I believe it was Kincade that—

“Q. State what orders, if any, Mr. Welsh gave you there as to your position. A. Mr. French stood to the opposite corner and I was to the left of French. Mr. Welsh said to me, ‘You get around on the end of the car where you can do something.’ Well, I stepped around and we started to pick it up. We got it on its edge and Mr. French give the car a shove, started the car up like that and the car fell and I just went off on the hard ground.

354 “Q. When he shoved the car, state what direction it fell. A. Well, it went south. I think the road runs in an angle, that way, at the depot there.

“Q. When he gave the shove, did he continue to hold the car? A. No, sir; he just shoved and stood back.

“Q. He let go of the car? A. He let go of the car.

“Q. At the time you was lifting the car on you said you was at the west end of the car? A. I was at the west end of the car.

“Q. Where was French? A. On the north side of the car.

“Q. On the north side of the car? A. Yes, sir; at the corner.

“Q. The same corner you was at the end of? A. Yes, sir.

“Q. Now, where were the other three men holding the car? A. On the east side of the car.

“Q. Then you and French were left? A. We were lifting there together.

“Q. To lift that entire part of the car? A. Yes, sir.

“Q. And when he let go of the car you had no other assistance? A. I had no other assistance. I was alone at the end of the car.

“Q. Were the three men on the other end still holding the car and lifting? A. They had hold, I expect, but I wasn’t given any time. After it started to go I went off like a shot and dropped on the ground.

“Q. Did you have notice of any kind? A. No, sir; no warning or notice of any kind whatever.

“Q. State, Mr. McGinnis, how much space there was between the west end of the push-car and the edge of the car loaded with bridge timber for you to stand on? A. I expect, maybe, fourteen inches. Not over the width of the stringer, if that much.

³⁵⁵ “Q. After you fell off state what was done. A. Well, after I dropped on the ground French he laughed at me.

“Q. French laughed at you? A. French laughed at me. Of course I thought my feet was all mashed to pieces and when I tried to stand up and couldn't do it I crawled on my hands and knees to get to the other side. They let me lay there until they loaded the car. After they finished loading the car they picked me up and carried me into the bunk-car and French was still laughing.”

On cross-examination he describes the incident thus: “When we picked it up and got it on its side, about like that, Mr. French was here and I was at the end of the car. We turned it on its edge just like that and then Mr. French started it that way and he stepped back and the car fell with a slant like that. It was all done so quick that all I know is French started it and then he laughed. . . . I was holding the end, just the same as that, the rubble-car in that position. When we got her started of course I had to follow the car around, but instead of him going with me and helping me to let it down he started it and then let go. . . . He shoved it, because I was right in there. There was nothing to stop it at all. I was right in there. There was nothing to stop it at all. I had hold of the end of the car expecting Mr. French to come around with me when he started it. Instead of doing that he shoved it and then stood back. Just stepped back and give it a shove.”

The evidence of the plaintiff was such as to eliminate the question as to unsafe place in which to work, for he says it was safe. The defendants showed that four men were turning the rubble-car. That two of them were lifting the car upon the edge and plaintiff and another were there to catch it as it came over and ease it down. Defendant's contention is described by French in this language:

"Q. What were the positions of these four men ³⁵⁶ with regard to the push-car when you turned it over? A. That is, our position when we were turning it over?

"Q. Yes. A. Why, there was myself and Kincade on one side raising it up and McGinnis and Ferguson on the other to catch it as it come over and let it down.

"Q. Suppose the main car was placed north and south, that being the main car and that the push-car, illustrating the position of the men on the car and how it was turned over? A. Yes, sir.

"Q. Turn it the other way? A. I can't tell myself which is north and south here. This is lengthways of the car; this would be the push-car across lengthways of the main car. I got at this corner, Kincade at this corner, and McGinnis and Ferguson over on this side. When we raised it up in this manner they was to catch it and let it down on the other side. Those were our positions as near as I can remember.

"Q. Who raised the car up? A. Kincade and myself.

"Q. How far did you raise it up? A. Quite perpendicular, until it stood on edge so they could get hold of it and let it down.

"Q. Then the men on the other side were to catch it and let it down? A. Yes, sir.

"Q. What was McGinnis' position on the other side of the car? A. He was over here on this corner, this side of the car. His corner was here and he was to catch it and let it down.

"Q. Was he standing opposite Kincade or opposite you? A. Kincade.

"Q. Who was opposite your corner? A. John Ferguson.

"Q. After you and Kincade had raised the car up, what was done with it then? A. Why, it was turned on over and it turned tolerably fast.

³⁵⁷ "Q. Did they catch the car on the other side? A. Ferguson caught his corner. I can't say whether McGinnis had hold of his corner or not, but the car was standing up that way and I couldn't tell on the other side whether he had hold of it or not. It's about as high as a man's head, nearly as high, but then as it came over Ferguson held his corner and McGinnis let loose and his corner swung that way and the next I saw McGinnis fell off the car. I suppose

the car must have fallen on his foot, but he said not, that it was just the jar of the ground that hurt his feet.

“Q. After you and Kincade raised the car up, what was the duty of the men on the other side as to letting it down?

A. Take it and let it down so as to not let it fall.

“Q. After you and Kincade raised it up there was nothing for you to do? A. No, sir; that was our part of the work. Two men to raise it up and two to let it down.

“Q. After you raised it up did you shove the car at all?

A. No, sir.

“Q. You did not? A. No, sir; not after it was perpendicular.

“Q. Did you simply raise the car up? A. Yes, sir.”

Defendant's testimony further showed that there were no directions by defendant Welsh to plaintiffs.

The foregoing sufficiently sets out the evidence for a disposition of this case as we see the law.

From the negligence pleaded and the proof made, the railway company, if liable at all, is liable upon the principle of respondeat superior. There are two classes of cases falling under this doctrine: one wherein the master is held liable for the nonfeasance or negligent failure of the servant to perform a duty, and the other where the master is held liable for the misfeasance or negligent performance of a duty. In the ³⁵⁸ one case the servant simply negligently fails to do what should have been done, and in the other he negligently does what should have been done and properly done.

In the first class of cases, the servant is not liable to third parties, but the master under the rule of respondeat superior is liable. In the second class both are liable to third parties. The servant, because he actually does the wrongful act occasioning the injury. The master, because, under the rule of respondeat superior, he is liable for the negligent act of the agent done within the scope of his employment, and in the course and performance of his master's business. In either case the master has recourse upon the servant as for breach of duty to the master.

The case at bar is one for misfeasance, or one of the second class as above classified. Counsel for plaintiff evidently so understood it, or there would have been no joinder of the servant. But whether he did so understand and so act is immaterial, for the evidence so shows. We have quoted at length from the evidence for the reason that in the brief

counsel for plaintiff undertakes to argue that the act of French in lifting and pushing the rubble-car in the way he did was misfeasance, but his act in failing to assist in letting down the car was nonfeasance. This will not do. The thing to be done was to turn over a rubble-car. French participated in that work, and if he was guilty of negligence in doing the work it was misfeasance.

By the verdict of the jury French was found not guilty of negligence, and appellant claims, and we think rightfully, that if French is adjudged not guilty of the charge of negligence, it likewise stands discharged. If defendant is liable at all under the pleadings and evidence it is liable by reason of the negligence of French and not otherwise. It is a travesty upon the law to say that French has been guilty of no negligence in this ³⁵⁹ case, and by the same verdict and judgment say the defendant is guilty of negligence, through French, its servant, for which it is liable, and should pay damages. Here were these men in the performance of a duty, that of loading their tools upon a car, which the evidence showed occurred every time they moved from one place to another, and that was every two or three days. The work to be done was lawful work, and work in the regular course of employment.

There are two parallel cases by the supreme court of Washington, wherein, in our judgment, the true rule is announced. In case of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, the court says: "Joint tort-feasors are liable to the injured person (other than that he may have but one satisfaction), as if the act causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of action are in no sense joint tort-feasors, nor does their liability to the plaintiff rest upon the same or like grounds. The act of the employé, even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employé not directed or ratified by the employer, the employé is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior, the rule of law which holds the master responsible for the negligent act of the servant, committed while the

servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to another for such an act, therefore, rests upon the employé, and when the employer is compelled to answer in damages therefor, he can recover over against the ³⁶⁰ employé: *Oceanic Steamer Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987; note to *Village of Carterville v. Cook*, 16 Am. St. Rep. 248; 1 *Shearman and Redfield on Negligence*, 5th ed., sec. 242; 2 *Van Fleet on Former Adjudication*, p. 1162."

Again, on page 716, Fullerton, J., in that case, further says: "So also, in such an action, whether brought against the employer severally or jointly with the employé, the gravamen of the charge is, and must be, the negligence of the employé, and no recovery can be had unless it is proven and found by the jury that the employé was negligent. Stated in another way: if the employé who causes the injury is free from liability therefor, his employer must also be free from liability. This was held in *New Orleans etc. R. R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. Rep. 109, 35 L. ed. 919."

In the *Doremus* case (23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649), the verdict was against defendant railway company, but said nothing as to defendant Root. By the judgment, Root, a conductor of the railway company, was exonerated of negligence, and the railroad company found liable, and it appealed. As in the case at bar, the plaintiff did not appeal from the judgment in favor of Root. The court reversed the judgment and remanded the case with directions to the lower court to enter judgment for the defendant.

In the case of *Stevick v. Northern Pac. R. R.*, 39 Wash. 501, the court through Mount, C. J., says: "The only negligence alleged or attempted to be proven was that the engine was out of repair and was leaking steam, and that Gregg, the agent of the company, had notice to repair it. The defendant Gregg was joined in the action by reason of the fact that he was the master mechanic in charge of the engine, knew its condition, and it is alleged, neglected to make the necessary repairs. The fact was admitted that the defendant Gregg was the master mechanic in charge of ³⁶¹ the engine, and that it was his duty to keep it in repair. When the jury found that defendant Gregg was not negligent, then it necessarily followed that the railway company was not negligent, because the negligence of the railway company,

as stated in the complaint, is based upon the negligence of Gregg. It is true that the complaint states 'that defendants, and both of them, negligently failed to repair said locomotive,' but the complaint, taken as a whole, shows that the negligence of the company is based entirely upon the alleged negligence of its servant Gregg in charge of its locomotives. The jury, having found that defendant Gregg was not negligent, and having returned a verdict in his favor, necessarily exonerated the railway company: *Doremus v. Root*, 23 Wash. 719, 63 Pac. 572, 54 L. R. A. 649."

In this case the verdict was practically in the form of the verdict in the case at bar. It found for the defendant Gregg, the employé, and against the railway company. The court reversed the judgment and ordered the action dismissed.

In our state, in the case of *Delaplain v. Kansas City*, 109 Mo. App. 107, 83 S. W. 71, the Kansas City court of appeals has touched upon the question herein involved. The city and its contractor had been sued for negligence. The negligence was that of the contractor. Plaintiff had judgment and the lower court set aside the judgment for alleged errors in the instructions and refusal of instructions. The trial court had refused an instruction asked by Walsh, the contractor, directing a separate finding as to the two defendants. Upon this point Broaddus, J., says: "But we cannot agree with the trial court that there was error in refusing to give defendant Walsh's instruction that the jury might find separately as to him. The city could not have been liable under the ³⁶² proof unless the defendant Walsh had been guilty of negligence on his part."

Because of the rule we here announce, it is generally held that where the action is one involving the doctrine of respondeat superior, a judgment in separate actions acquitting the servant bars the action against the master, and vice versa.

We are cited by respondent to the case of *Berkson v. Kansas City C. Ry. Co.*, 144 Mo. 211, 45 S. W. 1119. That case does not conflict with the views herein expressed. In the case at bar every element of negligence was eliminated from the case by plaintiff's testimony, except the alleged negligence of the servant French. This negligence consisted of negligently performing a duty in the doing of a lawful act. It is a case where the master is entitled to contribution from the servant. The *Berkson* case is not in this case. It is one of joint tort-feasors, pure and simple, and in which there is no

right to contribution. The court puts it upon that ground. On page 217 it is said: "If the jury found that the cable-car company was guilty of a tort in the nature of a trespass in entering upon and changing the grade of the street in front of plaintiff's property, it was liable for the entire amount of damages caused by its act, without reference to the question as to who else or how many others participated in the same wrong. Between joint wrongdoers no right of contribution exists, that one cannot be heard to complain that all guilty of the wrong have not been included in the same action or included in one common judgment rendered as the result of its prosecution."

The action in the Berkson case was in the nature of a trespass, a pure tort, and a trespass which was directed to be committed by the railway company.

We are firmly of the opinion that in cases where the right to recover is dependent solely upon the doctrine ³⁶³ of respondeat superior, and there is a finding that the servant, through whose negligence the master is attempted to be held liable, has not been negligent, as was true in the case at hand, there should be no judgment against the master.

The verdict in this case is a monstrosity. The jury say French was guilty of no negligence, yet in the same breath, say the company was guilty of negligence, although nothing further was done by the company than what it did through French, its servant. Such a verdict is wrong; it is inconsistent and unreasonable.

The conclusion reached upon this proposition renders further inquiry as to other questions unnecessary.

French has been acquitted of the charge of negligence. Plaintiff takes no further action as to him by way of appeal or otherwise. The case falls strictly within the case in 39 Washington.

From the foregoing conclusions it follows that the judgment should be reversed, and it is so ordered.

All concur.

The Liability of a Master to third persons for the negligence of his servant is the subject of a note to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 71. As a rule, master and servant are liable jointly for the negligent act of the servant done within the scope of his employment: Schumpert v. Southern Ry., 65 S. C. 332, 95 Am. St. Rep. 802; Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250; Gates v. Latta, 117 N. C. 189, 53 Am. St. Rep. 584.

HOCKADAY v. LYNN.

[200 Mo. 456, 98 S. W. 585.]

ADOPTION—By What Nations Recognized.—The adoption by one person of the children of another was unknown to the common law of England but it was recognized by the law of Rome and many other ancient nations. (pp. 673-675.)

ADOPTION—Strict and Liberal Construction.—Statutes of adoption are construed strictly against the adopted child, but the act of adoption is construed liberally in his favor. (p. 675.)

ADOPTION—Right of Inheritance in General.—Consanguinity is so fundamental in statutes of succession that it can be ignored by construction only when courts are forced to do so, either by the terms of express statutes or by inexorable implication. (p. 678.)

ADOPTION—Inheritance from Collateral Kindred.—An adopted child does not inherit from the brother of her deceased adopting parent the share which such parent would have inherited had he survived his brother. (p. 682.)

Charles W. Sloan and R. T. Railey, for the appellant.

Allen Genn, for the respondents.

460 LAMM, J. Cast on demurrer lodged below, plaintiff stood on her petition, submitted to judgment and appealed.

The case is this: In 1900 William E. Lynn, a bachelor, died intestate, seised of an undivided half-interest in a farm of two hundred and ninety-five acres in Cass county, leaving surviving him a brother, Cicero, and nephews and nieces (the children of a deceased brother and the children of a deceased sister) and their descendants. The deceased brother (James Lynn) died in 1896, leaving one son and also an heir by adoption, the plaintiff, now intermarried with one Hockaday.

Plaintiff's theory being that she was an heir of her adoptive father's brother, William E. Lynn, she sued Cicero and said surviving nephews and nieces (and the descendants of those dead) in partition.

In addition to conventional averments, plaintiff pleaded her adoption, her intermarriage with Hockaday, and further set forth an adjudication in her favor establishing her right as an adopted child of said James Lynn: See *Lynn v. Hockaday*, 162 Mo. 111, 85 Am. St. Rep. 480, 61 S. W. 885.

Defendants' theory being that plaintiff took nothing as heir to the brother of her adoptive father, and all the facts appearing in her petition, they demurred with the result aforesaid. Such demurrer conceded the truth of every aver-

ment well pleaded in the petition, hence the issue below became one of law. It is, moreover, one of first impression in this state, and may be formulated thus:

Does an adopted child, by reason of such adoption, become an heir to the real estate of a brother of her adopting parent who died after such parent, intestate?

Or, put another way, as formulated by defendants' counsel: "Does the adoption make her an heir only to the property of James Lynn, the adopting parent, or does the adoption make her an heir by representation in all the property which might have come to ⁴⁶¹ her adopting parent had such adopting parent survived his bachelor brother?"

The question presented being new, its answer must be got at by attending to the history of the law of adoption, its growth, the statute of adoption, the statute of descents and distributions, the analogies of the law to be searched out in cases decided by this court on related questions, and to the persuasive authority of the pronouncements of the highest courts of other states.

Adoption was unknown to the old common law of England: *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; Schouler on Domestic Relations, 5th ed., sec. 232. It was known to the Roman law, was attended by ceremonial dignity, and was of deep meaning and far-reaching results—a notable historical example of which is cited by Napton, J., in *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802 (from the leading case of *Vidal v. Commagere*, 13 La. Ann. 516), whereby Tiberius, being the stepson and adopted son of Augustus, his nephew, Germanicus (adopted by Tiberius on the command of Augustus Caesar), became the grandson of Augustus himself.

"Adoption," says Merrick, C. J., in *Vidal v. Commagere*, 13 La. Ann. 516, "was known to the Athenians and Spartans, as well as the Romans and ancient Germans, and was familiar to the writers of the New, if not the Old, Testament": See also, *In the Matter of Upton*, 16 La. Ann. 175; 1 Cyc. 917; *Abney v. DeLoach*, 84 Ala. 393, 4 South. 757.

It seems to have taken root in Egypt: Exodus, ii:10. Paul, himself a lawyer profoundly instructed in Hebrew jurisprudence, assumed the doctrine of adoption to be well known to his readers, and borrows the use of the doctrine as a hammer to clinch nails driven by him on matters of faith:

Rom. viii: 16, 17. The doctrine was not unknown to the Babylonians—witness the code of Hammurabi, compiled from 2285 to 2242 B. C. Sections 185 to 193, inclusive, of that code are curious and read as follows:

“Section 185. If a man has taken a young child ⁴⁶³ ‘from his waters’ ” (like Moses was taken by the daughter of Pharaoh, possibly q. v.) “to sonship, and has reared him up, no one has any possible claim against that nursling.

“Section 186. If a man has taken a young child to sonship, and when he took him his father and mother rebelled, that nursling shall return to his father’s house.

“Section 187. The son of a NER-SE-GA, a palace warder, or the son of a vowed woman no one has any claim upon.

“Section 188. If an artisan has taken a son to bring up, and has caused him to learn his handicraft, no one has any claim.

“Section 189. If he has not caused him to learn his handicraft, that nursling shall return to his father’s house.

“Section 190. If a man the child whom he took to his sonship and has brought him up, has not numbered him with his sons, that nursling shall return to his father’s house.

“Section 191. If a man, after a young child whom he has taken to his sonship and brought him up, has made a house for himself and acquired children, and has set his face to cut off the nursling, that child shall not go his way, the father that brought him up shall give to him from his goods one-third of his sonship, and he shall go off; from field, garden, and house he shall not give him.

“Section 192. If a son of a palace warder, or of a vowed woman, to the father that brought him up, and the mother that brought him up, has said, ‘thou art not my father, thou art not my mother,’ one shall cut out his tongue.

“Section 193. If a son of a palace warder, or of a vowed woman, has known his father’s house, and has hated the father that brought him up or the mother that ⁴⁶³ brought him up, and has gone off to the house of his father, one shall tear out his eye.”

Adoption was also an incident of Spanish law, was incorporated into the Code Napoleon, and from that code (or the Spanish law) found its way through Louisiana and Texas into the statutes of their sister states: Tiffany’s Persons and Domestic Relations, sec. 112; Ross v. Ross, 129 Mass. 243, 37

Am. Rep. 321; *Reiders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802.

As shown by Napton, J., in the *Reinders* case, our statute was not directly borrowed from the Roman law, and is, therefore, not attended with all the incidents of that law—one incident of which was that the adopted child took on the full rights of a child in its new family and lost its birth rights, becoming a stranger and an alien in the family of its origin.

From the twilight of remotest time it was considered that the "life of the flesh was in the blood": Lev. xvii: 10, 11, 12. Blood was of the mysterious essence of religious rites. The blood atonement, the blood tie, to have the same blood run in one's veins, to be bone of the bone, flesh of the flesh, were of the essential elements of things, earthly and spiritual. Hence, when the Mingo chief exclaimed, "There runs not a drop of my blood in the veins of any living creature," the picture of his savage desolation was made complete at one stroke.

Nevertheless, it is pointed out by those scholars who have dug up the origin of things from the dust of the past that the yoke of the blood tie, in this age or that, lay loosely on ancient peoples. It is shown that children might be lawfully exposed (devoted) to death, fed to beasts, burned in the red hot bowels of war idols, sacrificed to vows—witness the fate of Jephthah's daughter and the fate of Iphigenia, the child of Agamemnon's loins; and vacancies were filled by transplanting, or, to put it otherwise, grafting was allowed. Especially was this transplanting in vogue during the ⁴⁶⁴decadence of the Roman empire: Schouler on Domestic Relations, 5th ed., p. 362. It may, then, be said that, whether from sentimental causes or peculiarities of feudal tenures, the adoption of children came to be eyed somewhat askance by Anglo-Saxon peoples.

Adoption being unknown to the common law and in derogation of it, statutes of adoption have always been more or less strictly construed as against the adopted child: *Keegan v. Geraghty*, 101 Ill. 26; *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761, 39 L. R. A. 748; *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288. This frosty attitude is shadowed forth in the peculiar and cautious terminology of text-writers. Thus, Tiffany speaks of the relation as an "artificial relation": Tiffany's Persons and Domestic Relations, sec. 112. Schouler speaks of the relation as a

“quasi-parental relation”: Schouler on Domestic Relations, 5th ed., sec. 232. Strict construction, however, is not extended to the act of adoption itself. That is liberally construed in favor of the child adopted: *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; *Lynn v. Hockaday*, 162 Mo. 111, 85 Am. St. Rep. 486, 61 S. W. 885; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107.

Speaking of this plaintiff, Valliant, J., in *Lynn v. Hockaday*, 162 Mo. 111, 85 Am. St. Rep. 485, 61 S. W. 885, says: “Like a bud that has been cut from its natural stem and grafted into a foreign tree, she grew into the family and became a part of its very life—everything that adoption contemplates was accomplished.” That metaphor, chaste as a gem, does not mean, nor was it intended to mean, that plaintiff passed current as an heir, made such by the mold and stamp of consanguinity. It means that as between her and James Lynn she was given “everything that adoption contemplates”—that and no more. So, too, Black, J., in *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962, says: “For all the purposes of inheriting from the adopting parent the adopted child becomes, and is, the lawful child of such adopting parent.”

It appears, then, that the event of adoption fixes ⁴⁶⁵ the status of the child adopted in relation to the adoptive parent and to no one else. Says Tiffany, *supra*: “The law cannot, and does not purport to, do the work of nature, and create one a child who by nature is a stranger. But it can and does fix the status of the adoptive child to the adoptive parent as substantially the same as the status of a natural child.”

Osborn, J., speaking to the point in *Barnhizel v. Ferrell*, 47 Ind. 335, says: “By the act of adoption, the child is entitled to inherit from his adopted [adoptive?] parent as his heir, in the degree of a child: *Barnes v. Allen*, 25 Ind. 222. The act does not provide that he shall be the child of the adopting parent, but he shall take the name, and be entitled to take his property by descent or otherwise, the same as he would if he was his child or natural heir, and the adopting parent shall occupy the position toward the child of a father or mother, and be liable in every way as such. In *Schafer v. Eneu*, 54 Pa. 304, it is said: ‘The right to inherit from the adopting parent is made complete, but the identity of the child is not changed; one adopted has the rights of a child without being a child.’ And in *Commonwealth v. Nan-*

crede, 32 Pa. 389, the same court say: 'Giving an adopted son a right to inherit does not make him a son in fact. And he is so regarded in law, only to give the right to inherit.' "

In Schafer v. Eneu, 54 Pa. 304, Strong, J., further said: "Adopted children are not children [i. e., by the law of nature] of the person by whom they have been adopted, and the act of assembly does not attempt the impossibility of making them such." Indeed, it may be asked: Which of you, by taking thought, can add one cubit to his stature? No more, then, can A, by taking thought [i. e., by making a contract] make a stranger of blood kin to A's own kindred—make an adopted child have inheritable blood to A's collateral kin.

⁴⁶⁸ Apposite to this view it may be said that laws of descent and distribution, barring the one incident of a husband and wife's rights by marriage, are universally built on, and around, the idea of blood kinship. Inheritance flows naturally with the blood: Hole v. Robbins, 53 Wis. 514, 10 N. W. 617.

True it is that laws of descent and distribution are subject to arbitrary change by the law-making power, but to arbitrarily change them so as to repudiate or eliminate the basic principle of blood kinship would breed trouble and dismay. So deep does that notion run in the human breast and through our case-made law, that if it be ignored in a will, the fact of such unhappy and unnatural disposition of property may be put in as evidence tending to show testamentary incapacity, or undue influence, and, when united with other facts, may be sufficient to set the will aside: Meier v. Buchter, 197 Mo. 68, 93 S. W. 883, 6 L. R. A., N. S., 202.

An analysis of Revised Statutes of 1899, section 2908, of our statute of descents will show how closely it adheres to blood kinship in the devolution of estate. By that section the property (not limited by a marriage settlement) of one who dies intestate is made to descend in parcenary to "his kindred," male and female, subject to the payment of debts and the widow's dower. The word "kindred," in its primary legal acceptance, means "relatives by blood": Black's Law Dictionary, tit. "Kindred"; Keteltas v. Keteltas, 72 N. Y. 312, 28 Am. Rep. 155; Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535.

The idea of blood kinship is sharply accentuated by section 2911 of the same statute. That section directs that when in-

heritance is directed to pass to the ascending and collateral kindred of the intestate, if part of such collaterals be of the whole blood of the intestate, and the other part of the half blood only, those of the half blood shall only inherit half as much as those of the whole blood, etc.

⁴⁶⁷ But it is useless to further pursue the theme, since, in a general way, it may stand assumed as sound law that consanguinity is so fundamental in statutes of descents and distributions that it may only be ignored by construction when courts are forced so to do, either by the terms of express statute or by inexorable implication.

The supreme court of Indiana, in an adoption case—*Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788—in a most learned opinion by Elliott, J., somewhat criticises the conclusion arrived at in the earlier case of *Barnhizel v. Ferrell*, 47 Ind. 335, and somewhat criticises the conclusion reached by our own court in *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802. It is not our purpose to weigh those criticisms, but we may adopt with approval the following language from the *Humphries* case (100 Ind. 274, 50 Am. Rep. 788): “A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the subject of the statute, and to the condition of affairs existing when the statute was adopted.”

Referring to the foregoing general rules for finding a place for a new statute, setting bounds to its orbit, and making it dovetail into and become harmonious with a general system of law, it may be said this court has applied the same principles in effect. Thus, in *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962, while guardedly restricting the right of an adopted child to inheritance from its adoptive parent, it is held that (for that ⁴⁶⁸ purpose) the adopted child is a child within the purview of Revised Statutes of 1899, section 2939, on dower. It is there held that the event of adoption defeats the widow's right to elect under the statute to be endowed

of one-half of the real estate and personal estate belonging to her husband upon his death without leaving any "child or other descendants." See, also, *Fosburgh v. Rogers*, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201, in which the strict letter of the statute of descents and distribution is gently wrested to allow an adopted child to come into inheritance, but only as to the adoptive parent. Other cases might be cited to the same effect.

In fact it may be laid down as a general conclusion that while the statute of adoption must be read into the statute of dower and that of descents and distribution, it is with this singularity always to be observed, viz., that the adopted child is so let in only for the purpose of preserving in full its right of inheritance from its adoptive parent; and the door to inheritance is shut and its bolt shot at that precise point.

If we look to our statute on adoption it will be found to be writ large there that an adopted child bears only the badge and relation of child to the adopting parent. In Revised Statutes of 1899, section 5246, it is provided that "if any person in this state shall desire to adopt any child . . . as his or her heir or devisee, it shall be lawful for such person to do the same by deed," etc. The very next section (section 5247) provides that: "A married woman, by joining in the deed of adoption with her husband, shall, with her husband, be capable of adopting any child or children." It will thus be seen that, in the legislative mind, the effect of the adoption of a child is restricted to the adopting parent, and, hence, the adopted child does not become the child of a married woman by the adoption of her husband, but to become such child the adoption must be joined in by the wife. If this be true of ⁴⁶⁹ a wife, how much more strongly must it be true of collateral kinsfolk?

Defendants argue that aid for their theory may be had from section 5248, which provides in substance that from the time of filing the deed of adoption with the recorder the adopted child shall have the same right against the person or persons executing the deed, for support and maintenance and for proper and humane treatment, as a child has by law against lawful parents; and shall have and enjoy such rights and privileges against the persons executing the deed of adoption—the last clause of that section reading: "This provision shall not extend to other parties, but is wholly confined to parties executing the deed of adoption." This section has

been up for construction more than once. The most elaborate effort in its exposition was in *In the Matter of Clements*, 78 Mo. 352, where Hough, C. J., for this court, put this construction thereon, to wit, that its peculiar language refers to the custody and control of the child adopted, and "as the legislature had no power to authorize one person, whether acting from motives of charity, benevolence or caprice, to transfer to himself at his own electing, the custody and control of the child of another," nothing in that section should be binding on the natural parents of the adopted child, without the consent of such natural parents, which consent might be evidenced by joining in the deed. This section, therefore, throws no light on one side or the other of this controversy except there may be some slight evidence found therein of the trend of the legislative mind toward binding no one to the event of adoption except the actual parties to the event.

As said heretofore, the exact question presented has not been adjudicated by an appellate court in this state, but by analogy certain postulates may be established, the trend of the judicial mind may be got at and a sound conclusion reached.

⁴⁷⁰ For instance, if one inherit a share in an estate which his deceased father would have inherited, he inherits not from the father but directly from the intestate: *Barnum v. Barnum*, 119 Mo. 63, 24 S. W. 780. Applying that principle here, if plaintiff is to inherit at all from William E. Lynn, it is not from her adoptive father, James Lynn, who died before William E., but she is to inherit directly from William E. Lynn. This being so, her kinship to William E. Lynn is the only conduit through which her title may flow. The blood tie is the open sesame to unlock the treasure of inheritance. But here there is no kinship in the case—nothing but a dry contract with another. As to William E. Lynn, the event of adoption was *res inter alios acta*—plaintiff is an alien to the blood, and, therefore, it may well be argued, as defendants' counsel do, that by the statute of descents and distributions, she takes nothing, under the doctrine of *Barnum v. Barnum*, 119 Mo. 63, 24 S. W. 780.

Again, it was held in *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761, 39 L. R. A. 748, that the phrase "bodily heirs" did not include adopted children. It was held further, showing the strictness of this court's construction in the matter in hand, that the words "children" and "heirs"

in certain sections of the statutes of uses and trusts, pertaining to fee tail estates do not include adopted children. And, further, that an adopted child remains the child of its natural parents, and inherits from those parents.

It was held in *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802, that the estate of an adopted child (on his death intestate) will go to his blood relations, and not to his relations by adoption. It's a poor rule—won't work both ways.

In *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288, it was held, in effect, that the phrase "nearest and lawful heirs of my said wife" did not include an adopted daughter of said wife. After considering the case in the light of the language of testator himself, Brace, J., *arguendo*, formulates the views of this court (which are not without ⁴⁷¹ weight on the issue in the case at bar), as follows: "If, however, the testator had not hung out this light, by which his meaning may be easily read, it would seem that the very terms, 'nearest and lawful heirs,' would be sufficient to exclude the idea of an adopted heir; the status or relation of an adopted heir is a lawful one, since the law sanctions and provides a method for its creation, but the relation is not the creature of the law, but of the deed of adoption; a child by adoption is, in a limited sense, made an heir not by the law, but by contract evidenced by deed; adopted heir or heir by adoption would be appropriately descriptive of such relation; contradistinguished from such an heir are those upon whom the law casts descent, who are constituted heirs by law; these are appropriately described as heirs at law or heirs by the law. This distinction would, of course, be of little value in construing the will of a layman, if it were not almost universally and unconsciously recognized in the affairs of life; and that in common parlance we find that the terms 'heirs at law' and 'lawful heirs' are used indiscriminately as synonymous and convertible terms, and whenever either is used, they are invariably referred to the heirs upon whom descent is cast by law, and not to an heir by adoption. The relation of an heir by adoption is an exceptional and unusual one, and does not come within the ordinary and usual meaning of the words 'lawful heirs,' and those words ought not to be held, *ex vi termini*, to include an adopted heir, but when the testator uses the further and qualifying word 'nearest,' it would seem that one who is simply and only an heir by deed, deriving all his rights from the deed of adoption executed

long after the death of the testator, and none against any person other than his adoptive parent, must, by the very terms of the will under which he claims, be held to be excluded."

Considering the history and statute of adoption, the force of the foregoing rulings, and the reasons underlying ⁴⁷² the same, i. e., the philosophy of the law, we are persuaded to the conclusion that the tendency of judicial construction in Missouri is not toward, but away from, the theory so warmly urged upon us by plaintiff's learned counsel.

If we look elsewhere for persuasive authority, we find the exact point (and points involving similar contentions) uniformly held against plaintiff's theory. To this effect are *Van Metre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628, 23 L. R. A. 665; *Keegan v. Geraghty*, 101 Ill. 26; *In re Sunderland Estate*, 60 Iowa, 732, 13 N. W. 655; *Moore v. Moore*, 35 Vt. 98; *Meador v. Archer*, 65 N. H. 214, 23 Atl. 521; *Phillips v. McConica*, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445; *Quigley v. Mitchell*, 41 Ohio St. 375; *Barnhizer v. Ferrell*, 47 Ind. 335; *Helms v. Elliott*, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535; *Van Derlyn v. Mack*, 137 Mich. 146, 109 Am. St. Rep. 669, 100 N. W. 278; *Morrison v. Sessions' Estate*, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. 249; *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729.

The doctrine to be gathered from the foregoing cases is announced to be, in effect, to deny the right of the adopted child to succeed to the estate of any member of the adopting family other than the adopting parent, and that such adopted child does not succeed to the estate of ancestors or collateral kin of the adopting parent, nor to the estate of children born to the adopting parent: 27 Am. & Eng. Ency. of Law, 2d ed., 334, 1 Cyc. 933.

Though plaintiff's learned counsel have industriously collated cases from other jurisdictions, yet we find on examination they have cited us to no case holding a doctrine contrary to the above. Those cases apparently squinting at a contrary view, as, for example, *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349, take color from peculiar statutory provisions there under exposition. And the same may be justly said of the other cases relied on.

But, it is argued by plaintiff's learned counsel that such interpretation of the law puts too sour a complexion ⁴⁷³ on

it. If this be true, relief must be sought from the legislature and not from the judiciary.

It is finally argued that such interpretation puts an adopted child in a worse plight than a bastard—a bastard being allowed to inherit from his mother's brothers: *Moore v. Moore*, 169 Mo. 432, 69 S. W. 278, 58 L. R. A. 451; Revised Statutes of 1899, sec. 2916. If this argument were based on a correct premise, it ought not to control. But the premise is faulty. The bastard at common law was the child of nobody—*nullius filius*. He was a living example of the exceedingly old and right bitter adage (doubted, as unfair, even when in use): "The fathers have eaten sour grapes and the children's teeth are set on edge": Jer. xxxi: 30, 31. He could not inherit from the father—he was unknown. The law branded the mother figuratively (and sometimes, actually), with a scarlet letter—and, to interdict the sin, denied inheritable blood to the sinless child: 2 Kent's Commentaries, 212. But such is not the statutory law of modern times. By our law a bastard is allowed to inherit from his mother and (through her) from her blood kin, and she may inherit from her bastard child: Rev. Stats. 1899, sec. 2916. But in the case of an adopted child, how much more kindly does the law deal with him? In the first place, he may inherit from, and transmit inheritance to, his own blood kin, lineal as well as collateral. In the second place, by the event of adoption, he has *ex contractu*, the right of inheritance from his adoptive parent. And if the doctrine of Napton, J., in *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802, be sound, he may not only inherit from the adoptive parent, but the property thus inherited may pass away from the blood of the adoptive parent and go to the blood of the adopted child. The status of an adopted child in Missouri is thus in a sense made superior (in rights of inheritance) to any other child born in lawful wedlock—not to speak of those who have a bar sinister upon their escutcheon.

⁴⁷⁴ The case has been presented to us with such research and insistence by plaintiff's learned counsel that we have given it what care and diligence we can command. And, turn the matter as we may, and approach it from any side we may, we can come to but one conclusion, and that is: that under the statute of adoption and under the statute of descents and distribution, on the doctrine of this court enunciated in other cases, and on authority from other jurisdictions, as

well as upon the reason and natural justice of the thing, the plaintiff cannot recover.

Hence, the judgment below must be affirmed.

All concur.

RIGHT OF ADOPTED CHILDREN TO INHERIT.

- I. Status of Adopted Children as Heirs.
 - a. In General, 684.
 - b. Extraterritorial Force of Adoption, 685.
 - c. Retrospective Operation of Statutes, 685.
- II. Inheritance by Child from Parents.
 - a. From Adopting Parents, 686.
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 - c. From First and Second Adopting Parents, 687.
- III. Inheritance in Twofold Capacity of Children and Grandchildren, 687.
- IV. Inheritance from Kindred of Adopting Parent, 687.
- V. Inheritance from Adopted Child, 688.
- VI. Inheritance Through Adopted Child, 688.

I. Status of Adopted Children as Heirs.

a. In General.—The legal adoption by one person of the children of another is a subject to which we have previously directed our attention in this series of reports: See the note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210; *Van Derlyn v. Mack*, 109 Am. St. Rep. 674. Adoption was recognized by the law of Rome and of other ancient nations, as Justice Lamm points out in the principal case. It was known even to the American Indians: *Non-she-po v. Wa-win-ta*, 37 Or. 213, 82 Am. St. Rep. 749, 62 Pac. 15. At the common law of England, however, adoption and heirship by adoption were unknown. They are therefore dependent, in the several states of the Union, upon statutory enactments. It would seem that statutes providing for so humane and beneficent an institution as adoption would be welcomed by the courts and given full force and effect. But as a rule the courts have been inclined to maintain the same frigid attitude toward such statutes as they maintain against all legislative changes in the law. Some, though by no means all, of the courts have exacted a strict compliance with the statutes in order to effect a legal adoption at all, while the great majority of the courts have been disposed to minimize the rights of adopted children to take property by inheritance: See the note to *Van Derlyn v. Mack*, 109 Am. St. Rep. 674; *Albring v. Ward*, 137 Mich. 352, 100 Md. 609; *Bowins v. English*, 138 Mich. 178, 101 N. W. 204; *Beaver v. Crump*, 76 Miss. 34, 23 South. 432.

It has been decided that an adopted child is not within a conveyance to "bodily heirs": *Baleh v. Johnson*, 106 Tenn. 249, 61 S. W. 289; and that where a testator bequeaths his property to his "lawful heirs," he does not intend to include an adopted child: *Morrison*

v. Estate of Sessions, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. 249. But a deed conveying a remainder in fee to the "heirs generally" of the life tenant, if she should die leaving no child, gives such remainder to an adopted child: *Butterfield v. Sawyer*, 187 Ill. 598, 79 Am. St. Rep. 246, 58 N. E. 602, 52 L. R. A. 75, 79; and under a conveyance transferring real property to a trustee to be held for the use of a designated beneficiary during her natural life, and at her decease to her heirs at law, a child subsequently adopted by the beneficiary is, upon her death, entitled to take under such conveyance as heir at law of the original beneficiary: *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127, 116 Am. St. Rep. 536, 78 N. E. 697; and an adopted child is "issue" under a statute providing that when a husband dies intestate and "leaves no issue living," his widow shall receive a certain portion of his real estate: *Buckley v. Frazier*, 153 Mass. 525, 27 N. E. 768.

Adopted children take under a life insurance policy as "children" of the assured, who is their adoptive parent: *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520; *Von Beck v. Thomsen*, 60 N. Y. Supp. 1094, 44 App. Div. 373, affirmed in 167 N. Y. 601, 60 N. E. 1121. An adopted child who is not mentioned in the will of his adoptive parent takes his share of the estate by descent as a pretermitted child: *Flannigan v. Howard*, 200 Ill. 396, 93 Am. St. Rep. 201, 65 N. E. 782, 59 L. R. A. 664; *Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530; *In re Sandon's Will*, 123 Wis. 603, 101 N. W. 1089; and the adoption of a child works a revocation of a prior will executed by the adoptive parent, the same as would the birth to him of a child: See the note to *Van Derlyn v. Mack*, 109 Am. St. Rep. 678.

b. Extraterritorial Force of Adoption.—The general rule is that the adoption of a child authorized by the laws of the state gives it the status of a child of the adoptive parent, and this status, with the consequent capacity to inherit from such parent, will be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Hence, a child adopted in one state has capacity to inherit land situated in another state whose law and policy are not essentially different from those of the first state: *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628, 23 L. R. A. 665; *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207; *Succession of Caldwell*, 114 La. 195, 108 Am. St. Rep. 341, 38 South. 140; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321. The extraterritorial effect of adoption proceedings is further discussed in the note to *Van Matre v. Sankey*, 39 Am. St. Rep. 229.

c. Retrospective Operation of Statutes.—Heirs at law do not, prior to the death of the ancestor or other person from whom they claim, have any vested right in the continuance of their heirship, but the legislature has power to provide for a different line of inheritance. Hence it is that, though at the date of its adoption, a child may not

be entitled to take as heir at law of the adopting parent, a subsequent enactment giving adopted the same right of inheritance as other children of the adopting parent operates for the benefit of a previously adopted child, although thereby persons who would be heirs at law but for such enactment are deprived of the inheritance: *Dodin v. Dodin*, 16 App. Div. 42, 44 N. Y. Supp. 800; *Theobald v. Smith*, 103 App. Div. 200, 92 N. Y. Supp. 1019; *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127, 116 Am. St. Rep. 536, 78 N. E. 697.

A deed conveying land in fee to the "heirs generally" of the life tenant, if she should die leaving no child, gives such remainder to an adopted child, under a statute which provides that such child shall be deemed, for the purposes of inheritance, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, even though such statute was enacted after the deed was executed: *Butterfield v. Sawyer*, 187 Ill. 598, 79 Am. St. Rep. 246, 58 N. E. 602, 52 L. R. A. 73, 79. But adoption proceedings under a statute cannot divest an estate already vested in heirs, although the statute is intended to act retrospectively: *Ballard v. Ward*, 89 Pa. 358. A holding somewhat analogous to this will be found in *Blodgett v. Stowell*, 189 Mass. 142, 75 N. E. 138.

II. Inheritance by Child from Parents.

a. *From Adopting Parent.*—The authorities are generally agreed that for purposes of inheritance from the adoptive parents an adopted child is the lawful child of such parents, the same as though he were born of them in lawful wedlock, save as otherwise provided by the statute: *Matter of Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 76 Pac. 887; *Matter of Evans*, 106 Cal. 562, 39 Pac. 860; *Flannigan v. Howard*, 200 Ill. 396, 93 Am. St. Rep. 201, 65 N. E. 782, 59 L. R. A. 664; *Markover v. Krauss*, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993; *Wagner v. Varner*, 50 Iowa, 532; *Hilpire v. Claude*, 109 Iowa, 159, 80 N. W. 332; *Vidal v. Commagere*, 13 La. Ann. 516; *Cunningham v. Lawson*, 111 La. 1024, 36 South. 107; *Fiske v. Pratt*, 157 Mass. 83, 31 N. E. 715; *Fosburgh v. Rogers*, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201; *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962, 132 Mo. 73, 33 S. W. 443; *Moran v. Moran*, 151 Mo. 558, 52 S. W. 378; *Martin v. Long*, 53 Neb. 694, 74 N. W. 43; *Simmonds v. Burrell*, 8 Misc. Rep. 388, 28 N. Y. Supp. 625; *Rowan's Estate*, 132 Pa. 299, 19 Atl. 82; *Peter-son's Estate*, 212 Pa. 453, 61 Atl. 1005; *Eckford v. Knox*, 67 Tex. 200, 2 S. W. 372. A contrary rule appears to prevail in the District of Columbia: *Moore v. Hoffman*, 2 Hayw. & H. 173, Fed. Cas. No. 9764a.

The status of an adopted child in this respect is well expressed in *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683. "It is the event of the adoption," said the court in that case, "that fixes, under the law authorizing the adoption, the legal status of the adopted child; and

the child, by the event of adoption, becomes the legal child of the adopting parents, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions of the statute authorizing adoption declare otherwise. And when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties," approved in *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520; *Ferguson v. Herr*, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542.

In case one spouse alone adopts a child, or in case the statute gives an adopted child the right to inherit from one parent only, it would seem that the child is not entitled to inherit from the other spouse: *Webb v. Jackson*, 6 Colo. App. 211, 40 Pac. 467; *Sharkey v. McDermott*, 16 Mo. App. 80; note to *Van Derlyn v. Mack*, 109 Am. St. Rep. 676, where the property rights of the surviving spouse, as against those of adopted children, are discussed.

b. From Natural Parents.—The adoption of a child does not deprive him of his right to inherit from his relatives by blood, unless the statute provides otherwise. Hence, a child may inherit both from his adoptive and from his natural parents: *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761, 39 L. R. A. 748.

c. From First and Second Adopting Parents.—If, then, a child may inherit from its natural and also from its adoptive parents, there is no reason why an adopted child cannot inherit from both its first and its second adoptive parents. In other words, the relation of heirship created by the adoption of a child is not destroyed by a second adoption after the death of the first adopting parent: *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993.

III. Inheritance in Twofold Capacity of Children and Grandchildren.

Where a person adopts his grandchildren, and the natural parent of the children dies before the grandparent who has adopted them, it has been decided in Iowa that they would inherit from him in the double capacity of children and grandchildren: *Wagner v. Varner*, 50 Iowa, 532. But in Massachusetts and Pennsylvania it has been affirmed that they inherit from him in the capacity of children only: *Delano v. Bruerton*, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698; *Morgan v. Reel*, 213 Pa. 81, 62 Atl. 253.

IV. Inheritance from Kindred of Adopting Parent.

While an adopted child is entitled to inherit directly from his adopting parents, he is not, as the statutes have usually been construed, entitled to inherit through them from their ancestors: In re *Sunderland*, 60 Iowa, 732, 13 N. W. 655; *Meador v. Archer*, 65 N. H. 214, 23 Atl. 521; *Quigley v. Mitchell*, 41 Ohio St. 375; *Phillips v. McConica*, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445.

Neither is he entitled to inherit from the collateral kindred of his adoptive parents: See the principal case; *Van Derlyn v. Mack*, 137 Mich. 146, 109 Am. St. Rep. 669, 100 N. W. 278; *Estate of Moore*, 35 Vt. 98. "He can inherit directly from his parent, but he cannot inherit in lieu of his parent, by right of representation, from any of his parent's kindred": *Wygeth v. Stone*, 144 Mass. 441, 11 N. E. 729. In some of the states, moreover, an adopted child cannot inherit from the natural children of his adoptive parent: *Keegan v. Geraghty*, 101 Ill. 26; *Helms v. Elliott*, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535; note to *Van Matre v. Sankey*, 39 Am. St. Rep. 226. But in other states the law is otherwise: *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349.

V. Inheritance from Adopted Child.

There are a number of adjudications to the effect that on the death of an adopted child his estate goes to his relatives by blood, and not to his adopting parents or relatives by adoption: See the note to *Van Derlyn v. Mack*, 109 Am. St. Rep. 676; *White v. Dotter*, 73 Ark. 130, 83 S. W. 1052. But under a statute which provides that the adoptive parents shall inherit from their adopted child such property, with its profits and accumulations, as the child may have taken through them, the right of inheritance is not restricted to the particular property received by the child, but includes the proceeds thereof: *Swick v. Coleman*, 218 Ill. 33, 75 N. E. 807.

VI. Inheritance Through Adopted Child.

The heirs of an adopted child may be entitled to inherit through her a share of the estate of the deceased adopting parent, just as though she were a daughter by blood: See the note to *Van Derlyn v. Mack*, 109 Am. St. Rep. 676. Where an adopted child dies before the death of his adopting parent, leaving children, they inherit from the estate of the adopter of their deceased parent as if they were his grandchildren: *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683. And an adopted child takes a legacy given to one of its adopted parents, who dies before the testator, where the statute authorizing the adoption declares that the child becomes, to all intents and purposes, the child of its adopters, the same as if born to them in lawful wedlock: *Warren v. Prescott*, 84 Me. 483, 30 Am. St. Rep. 370, 24 Atl. 948, 17 L. R. A. 435.

FROST v. FROST.

[200 Mo. 474, 98 S. W. 527.]

TENANCY BY ENTIRETIES.—The Common-law Doctrine of estates in entirety is the law of Missouri. (p. 691.)

TENANCY BY ENTIRETIES.—Neither the Husband nor the Wife can so destroy the character of an estate held by them as tenants by entirety as to prevent the survivor from becoming the sole owner. (pp. 691, 692.)

TENANCY BY ENTIRETIES.—The Married Women's Statutes, by dispelling the idea of the unity of husband and wife, do not abolish or alter the character of estates in entirety. (p. 692.)

TENANCY BY ENTIRETIES.—The Title to Estates in entirety in Missouri is as it was at the common law; neither husband nor wife has an interest in the property to the exclusion of the other; each owns the whole while both live, and at the death of either the other continues to own the whole freed from the claim of anyone claiming under or through the deceased. (p. 693.)

ESTATE BY ENTIRETIES—Land Paid for in Part from Proceeds of Prior Estate.—Where a husband and wife sell land owned by them in entirety, and he uses the proceeds, together with his own money, to purchase other land in his own name, the court will decree that, to the extent the land is paid for from the proceeds of the prior sale, the title vests in them both as tenants by entireties, and that only the remainder vests in him alone. (pp. 694, 695.)

J. S. Brierly and T. N. Haynes, for the appellant.

C. W. Sloan and A. A. Whitsitt, for the respondent.

478 VALLIANT, J. Plaintiff is the wife of defendant. There are two counts in her petition. In the first it is alleged that the plaintiff and defendant jointly owned certain land in Clinton county, each owning an undivided half, which they sold for \$3,000; that defendant collected and appropriated to his own use the whole sum, therefore plaintiff asks judgment for \$1,500 and interest. In the second count it is alleged that in 1888 plaintiff and defendant, being then husband and wife and residing in Missouri, each owning "certain moneys" (how much each owned is not stated), invested those moneys in certain real estate in Clinton county "taking the title to said real estate in their names jointly, each owning an undivided half-interest therein"; that in 1901 by their joint deed they sold the Clinton county land for \$3,000, all of which sum came into the possession of defendant and with it he purchased two hundred acres in Cass county at the price of \$6,000, paying therefor \$4,000 cash and executing a deed of trust for the remaining \$2,000; that

of the \$4,000 cash, \$3,000 was the proceeds of the Clinton county land, one-half of which plaintiff avers was her own separate estate; that at the time of the purchase of the Cass county land it was agreed between the plaintiff and defendant "that ⁴⁷⁹ the deed should be made to plaintiff and defendant jointly, giving to each one his respective share or interest, in the same manner that the title to the real estate in said Clinton county was held," but that in violation of that agreement defendant, without the knowledge or consent of plaintiff, took the title in his own name; in consequence, by implication of law, a trust has resulted in plaintiff's favor. The prayer is that defendant be decreed to have taken the title, to the extent that her \$1,500 represent the purchase money in the land in trust for her use. There was also a prayer for general relief. The answer was a general denial, except the admission that plaintiff and defendant were husband and wife.

The cause was tried by the court without a jury. There was a finding of the issues for the defendant on the first count and judgment accordingly, from which there was no appeal. That count therefore is out of our way.

On the second count the finding and judgment were for the plaintiff, the judgment being that the plaintiff recover of defendant \$1,400 and interest, viz., \$1,436.63, for which execution was awarded and also that for satisfaction of the same the plaintiff should have a lien on the Cass county land. From that judgment the defendant has appealed.

At the trial the plaintiff endeavored to prove that some of her money went into the purchase of the Clinton county land; her proof on that point, however, was very vague and unsatisfactory. If she were here attacking the deed to the Clinton county land, seeking to reform it so as to establish a title by resulting trust in her favor on the ground that her husband used her money to purchase the land, her suit would fail because her proof is not sufficient; but such is not the character of this suit; she is not attacking the Clinton county deed, and the defendant is not disputing its terms.

⁴⁸⁰ Here the plaintiff comes alleging that she was the owner in fee as her separate statutory estate of an individual half of the Clinton county land, and relies on the deed conveying that land to her and her husband to prove that title. She says in her petition that when that land was sold it was agreed between her and her husband that the proceeds should be in-

vested in the Cass county land, "and that the deed should be made to the plaintiff and defendant jointly, giving to each one his respective share or interest in the same manner that the title to the real estate in Clinton county was held." She stands on that Clinton county deed as it is, and avers that it gave her an undivided half of the land as her separate estate. But when the deed was produced in evidence it showed that the title was not as she alleged, but that it vested in her and her husband as an estate in entirety. Neither she nor her husband owned a half-interest; they each owned the whole interest while both should live, and the survivor would have the whole when either should die. While they both lived in the marital relation she would have the equal enjoyment of the property with her husband, and in that qualified sense it might perhaps be said she had a half interest, but in addition to that right she had the contingent prospect of owning it all, and of that contingent right her husband could not deprive her.

Washburn, speaking of estates in entirety, says: "But if the estate is conveyed to them originally as husband and wife, they are neither tenants in common nor properly joint tenants, though having the right of survivorship, but are what are called tenants by entirety. While such estates have, like a joint tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest so as to affect the right of survivorship in the other. They are not seised, in the eye of the law, ⁴⁸¹ of moieties, but of entires": 1 Washburn on Real Property, 6th ed., p. 562.

The common-law doctrine of estates in entirety is the law of this state: *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 402; *First Nat. Bank v. Fry*, 168 Mo. 492, 68 S. W. 348.

The text-writer last above quoted on the same subject adds that on the death of either the survivor does not acquire a new title, but holds only the same title which he or she took in the beginning, freed of the contingency.

An estate in entirety is not a joint tenancy in which each holds an individual right. A joint tenant may destroy the joint tenancy and thereby destroy the right of survivorship by conveying his right to a third person, in which event his former cotenant and the third person to whom the conveyance is made become, as to each other, tenants in common. But neither the husband nor the wife in an estate of entirety

can so destroy the character of the estate as to prevent the survivor becoming the sole owner. An estate in entirety is a peculiar common-law estate, sometimes said to be founded on the common-law doctrine that the husband and wife are one. Perhaps it will not do to say that the estate rests entirely on that foundation, because sometimes we say that when the reason for a certain law ceases, the law founded on the reason also ceases. Modern legislation has done much to destroy the unity of husband and wife, yet in spite of such legislation it has been held in this state and elsewhere that estates in entirety remain as at common law: *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342; *First Nat. Bank v. Fry*, 168 Mo. 492, 68 S. W. 348; *Wilson v. Frost*, 186 Mo. 311, 105 Am. St. Rep. 619, 85 S. W. 375; *Baker v. Stewart*, 40 Kan. 442, 10 Am. St. Rep. 213, 19 Pac. 904, 2 L. R. A. 434.

Whilst estates in entirety originated in the common law, and were therefore in harmony with the ancient theory that the husband and wife were one, yet, that ⁴⁸² such estates did not arise as a necessity from that theory is shown by the fact that the common law also recognized that the husband and wife might become tenants in common: 1 Washburn on Real Property, 6th ed., p. 562; 4 Kent's Commentaries, 14th ed., p. 414. Therefore, the married woman's statutes, by dispelling the idea of the unity of husband and wife, do not abolish or alter the character of estates in entirety.

This court has held that the rights of the parties in an estate in entirety are in so far affected by our married woman's statutes that a wife who, in the absence of her husband (he being an inmate of an asylum for the insane), was alone in possession of the land and was wrongfully dispossessed by a stranger, could maintain ejectment in her own name and recover on the strength of her title in the estate in entirety: *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342. The court said: "The conveyance vests in the husband and wife the entire estate, not a joint interest. Each is entitled to the possession as against every person except the other." The court said that since the married woman's statute gave the wife the right to sue for whatsoever was hers, without joining her husband, therefore it was unnecessary for her husband to join in that suit, and that since as against everybody except her husband she was entitled to the whole estate she was entitled to recover in that suit. In the circuit court in that

case the judgment was for the wife for an undivided half of the land. This court said: "That was error. There could be no division of the estate." She was entitled to recover the whole.

In *Baker v. Stewart*, 40 Kan. 442, 10 Am. St. Rep. 213, 19 Pac. 904, 2 L. R. A. 434, it was contended that the effect of the married woman's statute of Kansas was to convert that which would have been an estate in entirety at common law into an estate in common, but the supreme court of that state held that although by force of the Kansas statute a married ⁴⁹³ woman in the control and disposal of her separate property was as free and unencumbered as a married man, and although she had an equal right with her husband to the control of property in which their title was an estate in entirety, yet she had not a separate estate in it, and that on her death her title did not descend to her heirs; the court, per Valentine, J., said: "And nearly all the authorities hold that the statutes relating to married women, and giving them the right to control and manage their own separate property, do not in the least affect the question as to what estate passes by a deed to a husband and wife, or what either shall take on the death of the other, and those authorities hold that such estate is still one of entirety." Thereupon the court refers to a long list of cases which so hold.

Under the facts of the case at bar it is not necessary for us to decide whether or not under our married woman's statutes the husband has been shorn of the exclusive right to the possession and control of the property held as an estate in entirety; it is sufficient to say, as we do say, that the title in such an estate is as it was at common law; neither husband nor wife has an interest in the property, to the exclusion of the other; each owns the whole while both live, and at the death of either the other continues to own the whole, freed from the claim of anyone claiming under or through the deceased.

Our married woman statute (Rev. Stats. 1899, sec. 4340), after declaring what shall be her separate property, says that it shall be "under her sole control." The lawmakers did not have estates in entirety in mind when they wrote that section.

There are decisions of this court which say that if a husband should invest his wife's money without her written consent in the purchase of land, taking the title in the names

of himself and his wife so as to create an ⁴⁸⁴ estate in entirety, she may, in a suit in equity, have a resulting trust declared in her favor, and the estate in entirety be set aside and the title vested in her or in a trustee for her use: *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261; *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486, 73 S. W. 202, 61 L. R. A. 166.

But those decisions do not proceed on the theory that the common-law estate in entirety has been abolished or altered in any respect; they proceed on exactly the same principle that would govern in a case where the husband under like circumstances had taken the title in his own name exclusively. It would be a fraud of the same character on the wife if the husband should take a deed in the name of himself and her when it should have been taken in her name alone, as it would be if he had, under like circumstances, taken it in his own name alone. And by the same principle, if the husband takes the proceeds of property that belonged to him and his wife in entirety and invests the same in other land, taking the title to himself alone, a court of equity, at the suit of the wife, will raise a resulting trust in her favor, and decree that the husband holds the title in trust for his wife and himself as an estate in entirety.

The trial court erred, therefore, when it decided that one-half the proceeds of the Clinton county land, \$2,800 (which is the amount the court found was the proceeds of that land), belonged to the plaintiff as her separate property. None of it belonged to her as her separate property, and none of it belonged to her husband as his exclusive property; the whole sum belonged to them both as husband and wife as an estate in entirety, and being so, the husband had no right to use it in the purchase of land taking the title in his own name; he should have taken the title, to the extent that that money purchased, in the joint names of himself and wife.

The evidence shows that the defendant invested the ⁴⁸⁵ proceeds of the Clinton county land, \$2,800, together with \$3,700 of his own money, making in all \$6,500, in the Cass county land. To the extent that \$2,800 represents the purchase price of the land the defendant was in duty-bound to have taken the title in the name of himself and wife as an estate in entirety, and to that extent he will be decreed now to hold the title in trust.

The judgment is reversed and the cause remanded to the circuit court of Cass county, with directions to enter a judg-

ment in plaintiff's favor decreeing that the title to an undivided forty-three one-hundredths of the Cass county land in question is vested in the plaintiff and defendant as husband and wife as an estate in entirety, and the title to the remaining undivided portion of the land is vested in the defendant, and that the plaintiff recover of defendant the costs in the circuit court. The judgment so entered will relate back to the date of the filing of this suit in the circuit court, and will be an adjudication of the rights of the parties at that date; whatever may have occurred since then to affect the rights of either party or both is not *res judicata* by the judgment in this case.

All concur, except Graves, J., not sitting.

Tenancies by Entireties are discussed in the note to *Den v. Hardenbergh*, 18 Am. Dec. 377. The common-law rules governing such tenancies are still in force in some of the states: *McLaughlin v. Rice*, 185 Mass. 212, 102 Am. St. Rep. 339; *Bynum v. Wicker*, 141 N. C. 95, 115 Am. St. Rep. 675, and see the cases cited in the cross-reference note thereto; in other states these rules have been very materially modified: *Kerner v. McDonald*, 60 Neb. 663, 83 Am. St. Rep. 550; *Donegan v. Donegan*, 103 Ala. 488, 49 Am. St. Rep. 53. As to the effect of the married women statutes on estates in entirety, see the note to *Rose v. Rose*, 84 Am. St. Rep. 442; *Robinson, Appellant*, 88 Me. 17, 51 Am. St. Rep. 367; *Baker v. Stewart*, 40 Kan. 442, 10 Am. St. Rep. 213.

BRANNOCK v. ST. LOUIS M. & S. E. R. CO.

[200 Mo. 561, 98 S. W. 604.]

DEMURRER.—By Answering Over After the Overruling of his demurrer, the defendant waives the question raised by it. (p. 698.)

VOID STATUTE—Effect of Incorporating in Revised Statutes. A statute which has been pronounced unconstitutional is not given any force or validity by subsequently being incorporated in the Revised Statutes by a committee appointed to compile and publish the statutes of the state. (p. 699.)

STATUTES—Determination of Their Existence by Court.—When the existence of a statute is in question, the court is not confined in its investigation to the published statutes, but may examine the original rolls in the office of the Secretary of State, though they are not produced in evidence. Nor is it necessary to plead or make proof of the statute, because courts are required to take judicial notice of it. (p. 701.)

L. F. Parker, E. H. Seneff and James Orchard, for the appellant.

Mozley & Wammock, for the respondent.

⁵⁶⁴ BURGESS, P. J. The plaintiff is the widow of Jason W. Brannock, who, at the time of the injury, January 10, 1903, which resulted in his death, was a brakeman in the employ of the defendant, and while in the discharge of his duty as such he was run over and injured by one of defendant's trains in the yards of defendant in the city of Cape Girardeau and injured, from the effects of which he died on the thirteenth day of January, 1903. Plaintiff sued for five thousand dollars damages and recovered a verdict and judgment for three thousand dollars.

The petition states that deceased was employed by defendant to work in its railroad yards at the city of Cape Girardeau, and while in the discharge of his duty as such employé it became and was necessary for him to throw switches, set brakes, couple and uncouple cars while the same were stationary and in motion upon defendant's railroad tracks, and while engaging in the disposition and placing of cars in said yards and preparing to uncouple a car from a moving train of defendant, at a point in said railroad yards where the defendant's track intersected what was then the main line of the St. Louis and Gulf Railway Company, another corporation, the foot of said Jason W. Brannock became caught and fastened between the main rails and guard-rails, or in a "frog," at the point of junction of said railroad tracks, by reason of which he was thrown upon said ⁵⁶⁵ track, and was run upon and over by the cars in said train immediately behind him, and his left leg was bruised, crushed and mangled, on account of which and the injuries sustained he died as before stated.

The petition further alleges that by sections 1123, 1124 and 1125 of the Revised Statutes of 1899, it is among other things provided that all corporations owning or operating any railroad or part of railroad in this state be, on and after the first day of November, 1887, required to adopt and put in use the best known appliances or inventions to fill or block all switches, frogs and guard-rails on their roads in all yards, divisional and terminal stations, and where trains are made up, to prevent, as far as possible, the feet of employés or other persons from being caught therein; and further pro-

viding that when any employé or other person should be maimed or killed by reason of noncompliance with the provision of said act, then in any suit for damages which might be instituted against the railroad company for such maiming or killing, proof of contributory negligence or carelessness on the part of the employé or other person so maimed or killed should not release such railroad corporation from liability, which act is still in full force and effect; and plaintiff alleges that the defendant violated the provisions and requirements of said act by wholly failing and neglecting to fill or block the switches, frogs and guard-rails at the intersection of said track in their said yard, and that plaintiff's husband was killed by reason of noncompliance on the part of the defendant with provisions and requirements of said act.

Plaintiff alleges that by reason of the death of her said husband as aforesaid she has suffered damages to the extent of five thousand dollars, for which sum, together with her costs, she prays judgment, in accordance with the statutes in such cases made and provided.

Defendant's answer to plaintiff's petition was first ⁵⁶⁶ a general denial; then, a plea of contributory negligence.

Plaintiff then filed a demurrer to defendant's answer, excepting as to the first paragraph thereof constituting a general denial, which demurrer was sustained and defendant saved an exception.

The facts may be summarized as follows: Deceased was a brakeman in the service of defendant, and had been in its employ from October, 1902, up to the time he was injured, on January 10, 1903; he was thirty-one years old, and in good health; a brakeman's wages were from sixty to sixty-five dollars per month; deceased was attempting to uncouple two cars and fell while doing so and the cars ran over his left leg. Witness Mat Buckner says that deceased went to put his left foot on the brake-beam; "it was a steel brake-beam, and just as he put his foot down, like that, his foot just went right down." This testimony is corroborated by Ben White, who was fireman of the switch engine. He testified that he told Brannock to put off two cars; that he, Brannock, started to do so and caught hold of the lever with his left hand; that witness walked along beside the car as long as he could keep up, and that Brannock did too; and that Brannock began to walk fast, and witness seeing that Brannock was going to hit the crossing he, witness, holloed to

him to look out; that deceased reached over and caught with both hands, and started to put his foot on the brake-beam, but that it slipped off, and he fell down after taking three or four steps.

The evidence also tended to show that Brannock's left foot was badly bruised, and the bottom part of the sole of his shoe that he wore upon the injured foot was doubled up over the upper, part of the heel appearing to be torn from the upper; that there were marks on the upper which looked like it might be the mark of the ball of two rails on each side of the foot, and that ⁵⁶⁷ in the crossing where the accident occurred there were two frogs in which there were no wedges to prevent a man's foot from being caught.

Defendant's first insistence is that the action is based upon sections 1123, 1124 and 1125 of the Revised Statutes of 1899. That these sections were declared to be unconstitutional in the case of *Wells v. Railroad*, 110 Mo. 286, because originally passed at an extra session of the legislature in 1887, the subject thereof not having been designated by the governor in calling said session; and that while sections 1123 and 1124 were re-enacted in 1891 (Laws 1891, p. 81), and are valid and subsisting statutes, section 1125 has never since been re-enacted, though incorporated in the Revised Statutes of 1899, and is, therefore, unconstitutional and invalid. That therefore the defendant had the right to plead and base its defense on contributory negligence, and the action of the court in overruling defendant's demurrer to that part of plaintiff's petition which pleaded said section 1125 was error, and that the action of the court in sustaining plaintiff's motion to strike out that part of defendant's answer pleading contributory negligence was also error.

With respect to the action of the court in overruling defendant's demurrer to the part of plaintiff's petition indicated, that question is unavailable to defendant here because of the fact that defendant answered over and thereby waived it: *Springfield Engine & Thresher Co. v. Donovan*, 147 Mo. 622, 49 S. W. 500; *Williams v. Chicago R. R. Co.*, 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631; *Walser v. Wear*, 141 Mo. 443, 42 S. W. 928; *Ely v. Porter*, 58 Mo. 158; *Gale v. Foss*, 47 Mo. 276; *Scovill v. Glasner*, 79 Mo. 449; *Coffman v. Walton*, 50 Mo. App. 404.

As to whether or not the court erred in sustaining plaintiff's motion to strike out part of defendant's answer depends upon the constitutionality of said section 1125.

Defendant insists that this section having been declared ⁵⁶⁸ unconstitutional in *Wells v. Missouri Pac. Ry.*, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847, and not re-enacted as were the other sections, it is of no force or effect, and its plea of contributory negligence should not have been stricken out.

An examination of the statute rolls in the office of the Secretary of State discloses the fact that this section was never re-enacted, as were sections 1123 and 1124, but was simply brought forward, and placed in article 2, chapter 12, by the committee on revision which was appointed to compile, arrange and publish the Revised Statutes of 1899, after the adjournment of the General Assembly. That committee had no legislative power conferred upon it, nor could such power have been conferred under the constitution, nor did the legislature attempt to confer upon it such power. And the fact that the committee brought it forward and placed it in the Revised Statutes of 1899 gave it no force or validity, and the section is void just as it was when first attempted to be enacted into the form of a law.

But plaintiff insists that as this section is found incorporated in the Revised Statutes of 1899, it is *prima facie* valid and binding law, and as no evidence was introduced showing its unconstitutionality, and the trial court was not advised by any pleading or motion that defendant then contended that the section was not properly incorporated in said statutes, it must be conclusively presumed that it was enacted in conformity with the state constitution.

Plaintiff relies upon the case of *State v. Wray*, 109 Mo. 594, 19 S. W. 86, as sustaining this position, and it must be conceded that it does so, but that case is not in harmony with subsequent decisions of this court. In the case of *Bowen v. Missouri Pac. R. R. Co.*, 118 Mo. 541, 24 S. W. 436, it is said: "But let it be conceded that the laws, as they are copied into the Revised Statutes, are *prima facie* valid and existing laws, still it does not follow that we must ⁵⁶⁹ stop with this evidence. It is a well-settled rule that courts of justice are bound to take judicial notice of public statutes enacted by the legislature of the state where the courts are held. Such statutes cannot be denied by a plea of *nul tiel record*; and the

existence of a public act is determined by the judges themselves, who, if there be any difficulty, are to make use of ancient copies, transcripts, books, pleadings, or any other memorial, to inform themselves: Sedgwick on Construction of Statutory and Constitutional Law, 2d ed., p. 26. Mr. Justice Miller concludes the opinion of the court in *Gardner v. Collector*, 6 Wall. 499, 18 L. ed. 890, with these words: 'We are of opinion, therefore, on principle, as well as authority, that, whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which, in its nature, is most appropriate, unless the positive law has enacted a different rule.' So the court may inform itself of the true reading of an act by an examination of the original on file in the office of the Secretary of State: *Clare v. State*, 5 Iowa, 509.

"These authorities are sufficient to show that, when the existence of a public statute of this state becomes a question before us, we are not confined to the statutes as they are published, but we may examine the rolls in the office of the Secretary of State, and this, too, though such rolls were not produced in evidence.

"It is unnecessary to either plead or make proof of a public statute, for the courts must take judicial notice of them. The statute rolls in the office of the Secretary of State are the primary and best evidence; and as it appears from an examination of them that ⁵⁷⁰ the two sections in question were not re-enacted, there is nothing left for us to do but declare them invalid, void."

In speaking of that case in *Ruckert v. Grand Ave. R. R. Co.*, 163 Mo. 260, 63 S. W. 814, it is said: "In *Bowen v. Missouri etc. R. R. Co.*, 118 Mo. 541, 24 S. W. 436, it was held that when the existence of a statute is in question, this court is not confined to the published statutes, but may examine the original rolls in the office of the Secretary of State. Nor is it necessary to plead or make proof of a public statute because courts are required to take judicial notice of it." It follows that the court erred in striking out defendant's answer.

In Bowen's case all of division one concurred, two in the result, and in Ruckert's case all of this division concurred, so that the entire court are agreed as to the law as announced in those cases, and, as *State v. Wray*, 109 Mo. 594, 19 S. W. 86, is in conflict with those cases, it should be overruled.

As it necessarily follows from what we have said that the judgment must be reversed, it is deemed unnecessary to pass upon other questions presented upon this appeal, as they may not again arise upon another trial.

The judgment is reversed and the cause remanded.

All concur.

When the Question Arises as to the Existence of a Statute, or of the time when it took effect, or of its precise terms, the judge who is called upon to decide it has a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question: Hollingsworth v. Thompson, 45 La. Ann. 222, 40 Am. St. Rep. 220. See, too, Portland v. Yick, 44 Or. 439, 102 Am. St. Rep. 633; Andrews v. People, 33 Colo. 193, 108 Am. St. Rep. 76.

CASES AT LAW
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

MORSE v. KING,

[73 N. J. L. 548, 63 Atl. 986.]

EXECUTORS AND ADMINISTRATORS.—A Foreign Executor may Sue in His Representative Capacity, without filing an exemplified copy of his testamentary letters, whenever the action arises out of a contract or transaction to which he is a party. (p. 703.)

C. Doremus, for the plaintiff in error.

C. English and R. H. McCarter, attorney general, for the defendant in error.

548 GUMMERE, C. J. The plaintiffs in this case sued as executors of Robert King, deceased. King was a **549** resident of New York at the time of his death, and the letters testamentary of the plaintiffs were issued to them in that state. The subject matter of the suit is a promissory note, given by the defendant to the plaintiffs, as executors, in payment of the purchase price of the business of Robert King, which was sold to the defendant by the executors. At the close of the trial the court directed a nonsuit to be entered, upon the ground that the plaintiffs had failed to comply with the statutory provisions which require a foreign executor to file, either in the office of the registrar of the prerogative court or in the office of the clerk of the court in which he is about to proceed, an exemplified copy of his letters testamentary as a prerequisite to his right to bring suit.

The correctness of this ruling is challenged by the assignments of error.

The statutory provisions which were made the basis of the direction of a nonsuit apply only in those cases in which the executor sues in the right of his decedent; in other words,

where the cause of action accrued to the decedent during his lifetime. Where the contract or transaction which is the basis of the suit is one to which the executor himself is a party—for instance, where the subject matter of the litigation is a promise made by the defendant, not to the testator, but to the executor—the executor may bring the suit, either in his individual or in his representative character, as he may elect (*Myers v. Weger*, 62 N. J. L. 432, 42 Atl. 280), and if he elects to sue in his representative capacity, he may do so without filing an exemplified copy of his letters. This is the general rule laid down in the text-books and supported by authority, as will be found by a reference to the cases cited in 13 American and English Encyclopedia of Law, second edition, 950, 951. It is the rule in this state, and was so declared by the supreme court in *Green v. Heritage*, 63 N. J. L. 455, 43 Atl. 698. In that case, like this, the contention was that the plaintiff, a foreign administrator, had no standing to sue without first filing in the court in which he brought his suit an exemplified copy of his letters of administration. The court held the contention untenable, ⁵⁵⁰ saying “that is true only when he sues in the right of his intestate, not in a case where he is a party to the transaction, although as administrator.” *Green v. Heritage* was afterward reversed in this court (64 N. J. L. 567, 46 Atl. 634), but the reversal went upon a ground which did not involve the merits of the case, which we expressly declined to consider.

The direction of a nonsuit was erroneous, and the judgment under review must be reversed.

Foreign Executors may Sue or be Sued upon contracts made by them in their capacity of executors, though the rule is otherwise with respect to contracts made by the testator in his lifetime: *Johnson v. Wallis*, 112 N. Y. 230, 8 Am. St. Rep. 742. See, too, *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80.

SHELTON v. ERIE RAILROAD COMPANY.

[73 N. J. L. 558, 66 Atl. 403.]

RAILROADS—Expulsion of Passenger—Failure to Pay Fare. The expulsion from a railroad train by a conductor of a passenger who neither pays his fare nor tenders a ticket that evinces his right to carriage is, in the absence of unnecessary force, not actionable. (p. 708.)

RAILROAD—Passengers—Conclusiveness of Ticket.—If a person on a railroad train proposes to pay his fare by ticket, he must be provided with and tender one that under the established rules of the company has the intrinsic effect of paying such fare, and in the determination of the right to travel under the ticket tendered as fare, conclusive force to be given to the intrinsic effect of such ticket as expressed on its face. (p. 711.)

RAILROADS—Passengers—Ticket as Fare.—A purchase of a ticket by a passenger is not the payment of his fare. When the ticket is accepted by the train conductor it becomes a fare, but not before. (p. 713.)

RAILROADS—Expulsion of Passengers for Failure to Present Proper Ticket, Though He Paid Therefor.—A person on a railroad train who refuses to pay fare other than to tender to the conductor a limited ticket which on its face shows that it has expired, may be lawfully expelled from the train, although he has paid for such ticket the full rate asked by the railroad company for an unlimited ticket. (p. 714.)

CONSTITUTIONAL LAW—Privilege Granted to Railroad.—The legislature may, by appropriate enactment, alter the charter of a railroad company, and a statute is not rendered unconstitutional by reason of a provision that railroads constructed and operated under a special charter are permitted to charge more per mile than those organized and operated under a general charter. Such discrimination is not based upon an illusory classification. (p. 715.)

Cortlandt & Parker and C. G. Parker, for the plaintiff in error.

A. H. Bissell, for the defendant in error.

559 **GARRISON, J.** This suit is grounded upon the plaintiff's expulsion from a railroad train under the following circumstances: On December 17, 1903, the plaintiff, being a passenger on the defendant's train from Montclair to Upper Montclair, a distance of one and three-quarter miles, tendered to the conductor in payment of his fare a ticket that bore date December 15, 1903, and read as follows: "Good only for continuous passage Montclair to Upper Montclair beginning on day of sale or the next day." The ticket had been sold to the plaintiff on December 15th, and hence by its terms had expired. Upon being informed by the conductor that under the rules of the company the ticket could not be

accepted for fare after the date of its expiration, the plaintiff refused to pay any other fare, and when told that under the rules he must in that case leave the train, replied that he would not do so unless legal force was used. When the train reached the next station the conductor placed his hand on the plaintiff's shoulder and the two walked to the rear platform of the car, and when the train had stopped at the station the plaintiff stepped down on the bottom step, from which, before the train moved off, he was given "a last push" by the conductor. For this expulsion the plaintiff brought his action in tort against the railroad company and recovered substantial damages.

Other facts are that the plaintiff had paid ten cents for his ticket, for which price he should have been given a ticket that was not limited; that the limitation printed on the ticket was one the defendant could not lawfully impose, and that the limitation had not been noticed by the plaintiff. Whether tickets without such limitation were issued by the defendant and on sale at its ticket offices did not appear. ⁵⁶⁰ The plaintiff also testified that he had with him twenty cents, the amount of the fare and excess demanded of him by the conductor, but that "he had paid the full price and refused to pay over again."

The right of the plaintiff to maintain his present action upon the foregoing facts is directly raised by assignments of error based on exceptions to the court's refusal to nonsuit the plaintiff or to direct a verdict for the defendant.

Upon the facts stated it is entirely clear that whatever injury the plaintiff suffered at the hands of the defendant had its origin in the delivery to him by the ticket agent of a ticket that was limited as to the time when it must be used, whereas for the price that he paid he ought to have been given a ticket that was not so limited. It is equally clear that the present suit is not grounded upon this injurious act of the defendant or its ticket agent, but upon the conductor's denial of the plaintiff's right to travel upon the ticket that was presented to him, viz., a ticket that on its face negatived the right that was claimed under it by the plaintiff. The precise question, therefore, is whether a passenger who has been expelled from a train for refusing to pay his fare may maintain an action for such expulsion if previously thereto he had tendered to the conductor a ticket that on its face

was not receivable for his fare, provided that he had accompanied such tender with the true statement that he had paid for such ticket the full rate for which a proper ticket ought to have been issued to him. In still narrower form the question is whether the rule that permits the expulsion of a passenger who neither pays his fare nor tenders a ticket that shows his right to ride is abrogated or modified by the circumstances that were communicated to the conductor in the present case.

While this question is one of first impression in this court, the underlying proposition that a passenger may lawfully be ejected for nonpayment of fare must be taken to be entirely established in this state. That "railroad companies are not bound to carry a passenger unless upon payment or tender of his fare; that they may in such case either refuse to permit ⁵⁶¹ him to enter the cars, or having entered them they may require him to leave them before the termination of the journey, and that if he refuses to leave they may remove him at a suitable time and place, using no unnecessary force," were more than half a century ago treated by Chief Justice Green, in *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671, as unquestioned propositions from which to reason with respect to a questionable regulation. The criticism of this case in *Daniel v. New Jersey Street Ry. Co.*, 64 N. J. L. 603, 46 Atl. 625, left untouched these basic propositions, which, indeed, are not now questioned anywhere.

In other jurisdictions, for whose decisions we entertain the highest respect, the question we are now called upon to decide has been passed upon in a large number of cases.

In a recent case in the federal court of appeals, Judge Taft said: "The law, settled by the great weight of authority, . . . is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company": *Poulin v. Canadian Pacific R. R. Co.*, 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800.

The supreme judicial court of Massachusetts, in *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, 46 Am. Rep. 481, held that "it is a reasonable practice to require a passenger to pay his fare or show a ticket, . . . and it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car upon his mere statement that he is entitled to passage. If the company had agreed to furnish him with a proper ticket, and

has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract, but is bound to yield for the time being to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way."

In a later case (*Dixon v. New England R. R. Co.*, 179 Mass. 242, 60 N. E. 581), the same court said: "The passenger's right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and for the time being the passenger must bear the burden which results from his failure to have a proper ticket. A passenger may have a right to transportation between certain stations because of his connection with a certain ticket, and yet if the ticket itself is not in order, a conductor is not bound to take it in payment of fare."

In *Western U. R. Co. v. Stockdale*, 83 Md. 245, 34 Atl. 880, the court of appeals of Maryland held that "in all cases when the question as to the right of a passenger to travel arises between him and the conductor of a train the ticket is, necessarily, the conclusive evidence of the nature and extent of the passenger's right."

"No other rule," said Judge Cooley, in *Hufford v. Grand Rapids Ry. Co.*, 53 Mich. 118, 18 N. W. 580, "can enable the conductor to determine what he may or may not lawfully do in managing the train and collecting fares." And on another occasion the same court held that "when a passenger receives a defective ticket from an agent of the company by reason of the mistake or negligence of the agent the conductor may refuse to accept such ticket, and is authorized to compel the passenger to leave the train if payment of fare is refused."

The New York court of appeals, in *Monnier v. New York Central etc. R. R. Co.*, 175 N. Y. 281, 96 Am. St. Rep. 619, 67 N. E. 569, 62 L. R. A. 357, said: "A person who becomes a passenger in a public conveyance must subordinate his conduct to all rules that are reasonable and valid. The simple duty of the conductor is to execute and enforce all reasonable rules, and that of the passenger is to obey them. If there is some fact or omission behind the rules not apparent upon the face of the transaction, the passenger must resort to some other remedy for his grievance besides the use of force against the conductor; and if, under such circumstances, he invites a personal collision with the officer in charge of the train, resulting

in his forcible expulsion, he puts himself in the wrong, and cannot sue the company or the officer for assault and battery."

In *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794, 52 L. R. A. 626, the supreme court of Illinois held that "the conductor was ordered by his superior not to receive a ticket like the one presented. This order he was bound to obey, and when the passenger was notified by the conductor that his ticket was ⁵⁶³ not good, and would not be received, it was his duty to leave the train in a peaceable manner, and hold the company responsible for the consequences. . . . The passenger should seek redress in the courts, where he will find a complete remedy for every indignity offered and for all damages sustained."

The supreme court of Michigan, in *Brown v. Rapid Ry. Co.*, 134 Mich. 591, 96 N. W. 925, held that "the rule of law in this state has been settled that as between the conductor of a railway train and the passenger, it is incumbent upon the passenger to produce as a ticket one which is apparently good on its face or pay the fare in cash, and that failing to do this the conductor has the right to eject the passenger from the car."

In *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65, 26 Am. St. Rep. 913, 11 S. E. 737, 9 L. R. A. 132, the supreme court of appeal of West Virginia said: "If a passenger pays a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that trip, but one in an opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be a ground of action against the company as a tort."

The supreme court of Alabama, in *McGhee v. Reynolds*, 117 Ala. 413, 23 South. 68, held that "as to the right of a conductor to eject a passenger who is found riding on a train on a ticket void on its face, it is proper to say, and we may announce without elaboration as the proper conclusion sustained by the great weight of authority, that the ticket is the sole and conclusive evidence to the conductor of the passenger's rights as such to be on the train, . . . and when it is void on its face, in default of payment of fare, he may deny the right of the passenger to ride on such ticket and expel him in a proper manner from the train."

These cases, and a host of others that might be cited, concur in holding the general doctrine that the expulsion by a conductor of a passenger who neither pays his fare nor tenders a ticket that evinces his right to carriage is, in the ⁵⁶⁴ absence of unnecessary force, not actionable: 6 Cyc. 551; 5 Am. & Eng. Ency. of Law, 594; 28 Am. & Eng. Ency. of Law, 156; 4 Elliott on Railroads, sec. 1594.

To the doctrine thus stated we yield entire assent. Many of the cases cited, however, by reason of the facts involved or by force of the line of reasoning pursued, go further than we are required to go in the decision of the present case. In order, therefore, that there may be no uncertainty as to the scope of our decision, and the ground upon which it rests, it is deemed best that such ground be explicitly stated.

Railroad companies, as they exist in this country, are corporations in which private capital is embarked in public, i. e., common, carriage. These corporations possess, therefore, a dual nature—having in trust, on the one hand, the financial interests of their stockholders, and, on the other, the convenience and safety of the traveling public. The two agents of these corporations with which alone the public comes in contact, viz., the ticket agent and the train conductor, represent, roughly, these two corporate capacities.

Hence, the transaction by which a traveler purchases a ticket from one of these agents for presentation to the other is likewise of this same and dual nature, and involves an observance on the part of the passenger of all reasonable regulations established for the conduct of each of these departments. These regulations are simple, uniform and well understood by the public. The ticket agent sells tickets for cash; he cannot give credit; his authority over the business of his company is limited to the issuance of such tickets as have been placed in his hands for that purpose, as incidental to which he may hand out time-tables and give such information to prospective passengers as may aid them in the selection of the tickets they require, i. e., tickets that will pay the fare between the points they designate. The obligation of the company with respect to the acts of this agent is that he shall deliver to passengers the tickets for which they ask and pay; if this is not done, whether the fault be that of the agent or the company, this obligation is broken and the company ⁵⁶⁵ is liable for the damages that result therefrom. The case before us is an illustration of such a breach.

The agency of the train conductor is even more limited, for it is all comprised in his duty to collect a fare from every passenger or to eject him from the train.

The fare thus to be collected by the conductor may be a cash sum, or it may be a ticket; that is for the passenger to determine. If the passenger proposes to pay in cash, he must be provided with, and tender to the conductor a sum that, under the established rules of the company, is sufficient to pay his fare; if he proposes to pay by ticket, he must be provided with and tender a ticket that under the established rules of the company has the intrinsic effect of paying such fare. This intrinsic attribute of the ticket is the essential quality to which it owes its efficiency. It is the possession of this attribute that distinguishes a ticket from a contract, on the one hand, and from a mere instrument of evidence, on the other. And I may here say that the failure to emphasize this essential feature of a railroad ticket is the chief reason for our unwillingness to place our decision solely upon the authority of the cases that have been cited; in most, if not all, of which the efficiency of such ticket is referred in a somewhat vague way to a hypothetical contract, the precise nature of which is necessarily involved in obscurity.

That this essential attribute to a railroad ticket did not escape the acute observation of Chief Justice Beasley is evident from his careful description of such a document in the opinion delivered by him in *Petrie v. Pennsylvania R. R. Co.*, 42 N. J. L. 449. "The plaintiff," he said, "had a passenger ticket, issued by the defendant, which on its face and according to its intrinsic effect did not authorize him, after having stopped at a place intermediate the designated termini, to use it for the purpose of continuing his journey." This language, which might well stand as a definition, not only recognizes that a railroad ticket has the intrinsic effect expressed on its face, but also that it may have an intrinsic effect that is not so expressed. This is a valid distinction, since it marks the difference between inspection and interpretation ⁵⁶⁸ as modes for determining the effect to be given to passports of this nature. The implication is that such effect, when not expressly stated, is to be gathered from the well-known customs of the business of which the ticket forms a part. A postage stamp is a good illustration of such mode of interpretation, or, still better, a special delivery stamp. Nothing on the face of these documents expressly states the effect of either of them,

but the well-known custom of which they are a part interprets them to the public and to postal agents alike. Theater tickets afford another familiar example, especially the return checks issued during a performance, which, though they may contain only the advertisement of some business house, are interpreted by custom to secure the return of the holder to the theater on the night of their issue. Upon a far more extensive scale, promissory notes became, early in the history of the English law, subject to be interpreted solely by the business customs of merchants. Whether I am correct or not in these views as to the interpretation of railroad tickets is, however, of no immediate importance, since in the present case the plaintiff's ticket called for no interpretation, for the reason that it expressed on its face the intrinsic effect to be given to it. The subject, which is one of great importance, is discussed at length and in a most suggestive way by Professor Beale, in an article on "Tickets," in 1 Harvard Law Review, 20.

For present purposes, we need to go no further than to say that in the determination of a right to travel under a railroad ticket tendered as fare, conclusive force is to be given to the intrinsic effect of such ticket as expressed on its face. Such was the force given to it by Chief Justice Beasley in the case just cited, and by Mr. Justice Van Syckel in *Spiess v. Erie R. R. Co.*, 71 N. J. L. 90, 58 Atl. 116, where the judgment was reversed because the lower court had left it to the jury to say "whether the plaintiff believed he had a right to use the ticket." Such was the force accorded to the ticket in *Rogers v. Atlantic City Ry Co.*, 57 N. J. L. 703, 34 Atl. 11, where Mr. Justice Lippincott, speaking for this court, said: "The ticket is the conclusive evidence of the contract of carriage upon which the conductor ⁵⁶⁷ had the right to rely." And in the recent case, in this court, of *McDonald v. Central R. R. Co.*, 72 N. J. L. 280, 111 Am. St. Rep. 672, 62 Atl. 405, which was a time-table case, and not one of the nonpayment of fare, the decision that the plaintiff's expression was unlawful was entirely consistent with the face of his ticket.

This intrinsic effect of a railroad ticket was also recognized in the opinion of Chancellor McGill, in this court, in the case of *Pennsylvania R. R. Co. v. Parry*, 55 N. J. L. 557, 39 Am. St. Rep. 654, 27 Atl. 914, 22 L. R. A. 251, when he said: "The ticket is a mere token that fare has been paid, and that the passenger has the right to be carried to the destination it indicates, according to the reasonable regulations of the railway

company." For a token is a symbol that betokens something, i. e., that carries within itself that which it signifies, which is in effect a paraphrase of the significant term in Chief Justice Beasley's description.

The only case in our courts, as far as I can discover, that is out of harmony with these views, is *Perine v. North Jersey Street Ry. Co.*, decided in the supreme court and reported in a per curiam in 69 N. J. L. 230, 54 Atl. 799. In that case the passenger tendered a transfer ticket that under the rules of the defendant had expired, and was ejected for refusing to pay a fare. The question we are now considering was therefore squarely raised. Judgment in favor of the plaintiff was sustained solely upon the authority of *Consolidated Traction Co. v. Taborn*, 58 N. J. L. 1, 32 Atl. 685. The *Taborn* case, however, was not an authority for the proposition for which it was thus cited, and has no bearing upon the question we are considering. In the *Taborn* case, the plaintiff was expelled because she had no ticket; hence neither the intrinsic effect of a ticket nor its proper interpretation could possibly arise. What the *Taborn* case held was that where the company, for its own convenience, had established a custom of transferring its passengers to another car, because of a temporary break in its road, a change of rules, promulgated without notice on the very day the plaintiff was expelled, was as to her an unreasonable regulation. The *Perrine* case was, therefore, unsupported by the only authority cited for that purpose, and being, as we ⁵⁶⁸ think, erroneously decided, must be deemed to be overruled by our present decision.

In the light of the foregoing considerations, the grounds for our adoption of the rule that the face of a railway ticket, when it speaks upon the subject, is conclusive upon its sufficiency as a railroad fare, should be clear. That this rule, although upon somewhat variant grounds, is established elsewhere by the great weight of authority, was stated at the outset of our consideration of the subject.

In the citation of cases then made there was an intentional omission of those cases that hold the opposite view, and for this reason, viz., that such cases are without exception, as far as my examination goes, based upon one or the other of two radically unsound propositions, according to which they may be conveniently grouped for criticism.

By far the greater number of the cases thus referred to proceed upon the idea that the delivery of a wrong ticket by

the ticket agent or the giving of misleading information establishes a contractual right between the injured passenger and the railroad company, for the breach of which the train conductor must afford redress upon a summary investigation. The fundamental fallacy of this position is that it assumes the authority of ticket agents to make contracts for railroad companies. The authority of such agents is notoriously limited to the sale of tickets and to the doing of acts that are ancillary thereto. By no rule of the law of agency or of evidence can the acts or statements of a ticket agent beyond the scope of his limited authority be erected into a contract binding upon the railroad company. What has been mistaken for this authority to make contracts is the ability of these agents to make trouble for their companies by their negligence in the delivery of tickets, or their mistakes in giving information. For injury resulting from these acts of the ticket agents their principals may, as we have already seen, be held liable in an appropriate action.

The judicial conclusions that have been constructed on this erroneous foundation do not in any way commend themselves to us.

⁵⁶⁹ The other proposition that has been characterized as unsound is that the purchase of a ticket by a passenger is the payment of his fare. Such was the precise claim of the plaintiff in the present case. The fallacy of this proposition must be apparent. It is one of fact. Payment of fares is made to the conductor alone. This is true whether such fare be by cash or by ticket. Ticket agents do not collect or receive fares; they issue tickets. A fare is a payment that is made when the right of carriage is claimed. The very word "fare" originally meant "a journey": Webster's International Dictionary. Such is still its connotation.

When a ticket is accepted by the conductor it becomes a fare, but not before. In the case of *Parry v. Pennsylvania R. R. Co.*, 55 N. J. L. 557, 39 Am. St. Rep. 654, 27 Atl. 914, 22 L. R. A. 251, the plaintiff's ticket had been accepted as fare for part of his return trip, hence the statement (Chancellor McGill, *ubi supra*) that it was a token that fare had been paid was strictly correct.

The failure to observe this distinction has resulted in a line of decisions which, while recognizing the right of the conductor to expel a passenger for nonpayment of fare, hold that the company is liable for such expulsion if in point of

fact, to use the language of these cases, "the passenger has paid his fare to the ticket agent." Extended comment upon this line of reasoning is believed to be unnecessary.

Our conclusion upon the whole case is that the plaintiff was lawfully expelled from the train for nonpayment of fare, and that for such an expulsion no action can be maintained. The facts upon which this conclusion rests having all appeared at the close of the plaintiff's case, the motion for nonsuit then made should have been granted. The judgment must, therefore, be reversed.

In the preliminary statement of the plaintiff's case the limitation placed upon his ticket was said to be one that it was not lawful for the railroad company to impose. That statement embodied the decision we had reached upon a question raised by the railroad company touching the constitutionality and construction of the thirty-eighth section of the ⁵⁷⁰ general railroad law (Pamph. Laws 1903, p. 664), which reads as follows:

"Any railroad company may demand and receive such sums of money for the transportation of persons on its railroads and connections, and for any other services connected with the business of transportation of persons on or over said railroad to or from the same, as it shall from time to time think reasonable and proper, not exceeding, in the case of railroad companies organized under this act, three cents per mile for carrying each passenger on such railroad, and not exceeding, in the case of railroads constructed or operated under a special charter, three and a half cents per mile for carrying each passenger on such railroad, and not exceeding the rate per mile limited by the charter, but no charge shall be required to be less than ten cents; tickets for passengers, except excursion tickets, or tickets sold at reduced rates, shall be good until used; tickets sold at less than the rates herein limited shall be good and shall entitle the holder to passage for a limited number of days only after the date of issue thereof, which limit shall be clearly stated and set upon the ticket; any railroad company owning or operating a railroad may collect an excess of ten cents over the established rate of fare from any passenger who pays his fare on the train, giving him a receipt therefor, which shall entitle the holder to have such excess refunded upon presentation at any ticket office of the company on the line of its railroad."

The argument for the company was that the charter of the Montclair Railway Company, under which the plaintiff is

error was operating, authorized a charge of eight cents per mile; hence it was contended the ticket in question was issued at a reduced rate, and might lawfully be limited. This argument rests upon the contention that the foregoing section of the general railroad law is either unconstitutional or has no application to the case. Neither of these claims is, in our opinion, well founded.

That the legislature could, by an appropriate enactment, alter the charter of the Montclair Railway Company seems ⁵⁷¹ to be clear: *Montclair v. New York etc. R. R. Co.*, 45 N. J. Eq. 436, 18 Atl. 242; Pamph. Laws 1885, p. 324.

This being so, we think that section 18 of the general railroad law is not rendered unconstitutional by reason of the provision that railroads constructed and operated as the plaintiff in error is, under a special charter, are permitted to charge one-half cent more per mile than railroads organized under the general act are permitted to charge. The argument is that this discrimination, which in itself is favorable to the plaintiff in error, is based upon an illusory classification. The classification is "railroad companies organized under this act" (the general railroad law) and "railroads constructed and operated under a special charter." The former of these classes is rendered general, for purposes of railroad legislation, by section 88, hence it must follow that the residue left, after subtracting this general class from the entire class, is also general for the like purpose: *Point Breeze Ferry Co. v. Bergen Neck R. R. Co.*, 53 N. J. L. 108, 20 Atl. 762.

The contention that the words "good until used" does not mean good "for passage," is, in our judgment, entirely untenable.

Having reached the conclusion that section 38 of the general railroad law was constitutional; that it applied to the plaintiff in error, and that its effect was to render unlawful the limitation placed on the ticket that was delivered to the plaintiff below, we embodied such result in our original statement of facts, and have throughout the discussion of the case given it consideration in so far as it bore upon the legal questions at issue.

For reasons already stated, the judgment of the circuit court is reversed.

The Principal Case, while supported by many decisions (*Kiley v. Chicago etc. Ry. Co.*, 189 Ill. 381, 82 Am. St. Rep. 460), is opposed by others, the weight of which is at least as great, and probably

greater: Georgia Ry. etc. Co. v. Baker, 125 Ga. 562, 114 Am. St. Rep. 246; Memphis St. Ry. Co. v. Graves, 110 Tenn. 232, 100 Am. St. Rep. 803; Citizens' St. R. R. Co. v. Clark, 33 Ind. App. 190, 104 Am. St. Rep. 249; Indianapolis St. Ry. Co. v. Wilson, 161 Ind. 153, 100 Am. St. Rep. 261, and cases cited in the cross-reference note thereto.

HEBREW v. PULIS.

[73 N. J. L. 621, 64 Atl. 121.]

FALSE IMPRISONMENT—Essentials of Imprisonment.—The essential thing to constitute an imprisonment is constraint of the person, which may be caused by threats as well as by actual force, and the threats may be by conduct or by words; and if they are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of his liberty as by prison bars. (p. 718.)

FALSE IMPRISONMENT—Apprehension of Use of Force.—In an action for false imprisonment, unless it is clear that there was no reasonable apprehension of force, it is a question for the jury whether the submission of the plaintiff to arrest was a voluntary act, or brought about by fear that force would be used. (p. 718.)

ARREST—Right to Search Person.—An officer without a warrant for an arrest is not justified in compelling a person suspected of larceny to strip naked for the purpose of a search of her person. (p. 719.)

N. Abeel, for the plaintiff in error.

C. Doremus, for the defendants.

⁶²¹ SWAYZE, J. This is an action for false imprisonment. A nonsuit was ordered at the trial for the reason that the restraint ⁶²² complained of was thought to be due to the voluntary act of the plaintiff.

The facts, as testified to by the plaintiff, are as follows: She was a domestic servant in the employ of Helen Sands and Elizabeth Sands, two of the defendants. Helen had lost a diamond ring. Pulis, the other defendant, known to the plaintiff as a police officer, was called in. In the presence of the Misses Sands he asked the plaintiff if she had the ring; she denied having it. After further talk, Pulis said: "I want you to go upstairs and strip yourself to your hide." What further happened is thus told by the plaintiff: "I said, 'Do you mean to say I have got the ring?' I said, 'I don't know anything about that ring, and you have no right to say so'; and when I said that he said, 'Don't you tell me what you

don't know; you do what I tell you'; he said, 'Don't you dare to dictate to me what I have no right to do,' and he shook his finger in my face; and he said, 'We are going to search every piece of clothing you own'; and I went out in the hall, and I said my key is downstairs, to the door, and I went down to get it—went down there and got the key and went back—and then he said, 'You go upstairs and strip yourself to the hide,' and I went upstairs and sat in the rocking-chair, and the three girls stood looking at me, and I was crying, and the detective pulled out everything and looked in the tips of the shoes and the heels, and shook out the stockings, and looked through the bureau drawers, and turned everything over, and looked at the letters, and opened the pocketbook, and asked me where I got so much money, and he said, 'I am going to find that ring'; and then he says, 'Now, I want you to strip and undress to your hide'; and when he said that, and I was crying still, I said, 'Do you really mean that I have got to undress?' and he said, 'Yes,' and with that he stepped out of the room, and Miss Bessie and Ellie followed him, so then Miss Helen was there, and as I took off everything—I took the long skirt off and let all my other clothes down, and she took up piece by piece and searched it.

"Q. Who searched them? ⁶²³ A. Miss Helen.

"Q. Where was Mr. Pulis all this time? A. Standing outside the door.

"Q. How do you know? A. Because I could hear him; the door was open.

"Q. Did you take your shoes and stockings off? A. I did; and when she had searched everything, she said, 'I have searched everything, and I cannot find the ring on her'; and the detective stepped inside the sill of the door, and he said, 'Are you stripped right down to the hide?' and I said, 'Yes, sir'; and then he said, 'All right'; and then he said, 'Yes, you can dress now.'

"Q. How long did he stay there in the room after that? A. He just stayed there long enough to look at me, and then said I could dress."

The question presented to us is whether, upon this evidence, it appears so conclusively that the plaintiff's conduct was voluntary that a jury would not have been justified in finding that she was under constraint. Our view differs from that taken at the trial. The fact that Pulis was a police officer, and known to the plaintiff to be such; that she was confronted not only

by him, but by her employers; that she was suspected of larceny, for which the officer might arrest her if he had reasonable ground to believe that the crime had been committed, warranted her in believing that if she failed to submit to Pulis' demand she would be actually arrested. The emphatic language in which the officer commanded her to strip to the hide was calculated to terrorize a girl in her situation, and the very fact that the officer, wholly without right, asserted such authority, and gave such a command, justifies the inference that he and his employers and codefendants intended to terrorize the plaintiff and to secure the effect of a search without legal process. If it was only intended to secure the consent of the plaintiff to a thorough search, the presence of the police officer was quite unnecessary; the appeal of the Misses Sands would have been as persuasive as the command of the officer, but for his seeming authority. We think the case at least presents a ⁶²⁴ question for the jury, and that the reason given by the learned trial judge is not sufficient to justify his conclusion.

We think, further, that the nonsuit cannot be sustained on any other ground. There is, indeed, no proof that the defendants laid hands on the plaintiff; but that is unnecessary. Whatever doubt may have been thrown upon this question by some of the earlier English cases is now removed by the later authorities: *Grainger v. Hill*, 4 Bing. N. C. 212; *Warner v. Riddiford*, 4 Com. B., N. S., 180.

The American cases are to the same effect: *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480; *Pike v. Hanson*, 9 N. H. 491; *Brushaber v. Stegemann*, 22 Mich. 266; *Johnson v. Tompkins*, Baldw. 571, Fed. Cas. No. 7416.

The essential thing is the constraint of the person. This constraint may be caused by threats as well as by actual force. and the threats may be by conduct or by words. If the words or conduct are such as to induce a reasonable apprehension of force and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. Unless it is clear that there is no reasonable apprehension of force, it is a question for the jury whether the submission was a voluntary act, or brought about by fear that force would be used. No doubt cases may arise where it will be a question of difficulty to determine how far the free will of the plaintiff was overcome, but that determination rests with the jury.

That the imprisonment was without right, and therefore false, must be assumed as the case stood when the nonsuit was ordered. No justification then appeared; the officer was without a warrant, as far as we know. He seems to have been also without reasonable grounds to believe that a felony had been committed, for after the search of the plaintiff's person, he was asked what else he would do with her, to which he replied, "I cannot lock her up; she has not got it on her." Upon the plaintiff's case it appears that the defendants themselves recognized that they had at the time no reasonable ground for suspecting the plaintiff of larceny, and that they were then seeking evidence which might give them ground of ⁶²⁵ suspicion. But even if the case had been such that the officer would have been justified in arresting without a warrant, we think he was not justified in compelling the plaintiff to strip naked. Whether he would have been justified in carrying a search of the person to that point if he had had a warrant is a question not presented. The fact that the officer went to this length might suffice to render him a trespasser ab initio. The other defendants stood by and apparently assented to his conduct, and took part in the search. They are therefore liable to the same extent as he.

The judgment must be reversed, and the record remitted for a new trial.

WHAT AMOUNTS TO FALSE IMPRISONMENT.

- I. What Coercion Necessary, 719.
- II. Necessity for Actual Force, 721.
- III. Threats, 722.
- IV. Words Alone, 723.

I. What Coercion Necessary.

False imprisonment is an unlawful restraint of one's freedom of locomotion or of action: *Rich v. McInerny*, 103 Ala. 345, 49 Am. St. Rep. 32, 15 South. 663; *Efroymsen v. Smith*, 29 Ind. App. 451, 63 N. E. 328; *State v. Lunsford*, 81 N. C. 528. As respects false imprisonment, any physical detention of the person is imprisonment: *Egleston v. Scheibel*, 113 App. Div. 798, 99 N. Y. Supp. 969. It has been said that "false imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls, or that he be assaulted or even touched. It is not necessary that there should be any injury done to the individual's

person, or to his character or reputation. Nor is it necessary that the wrongful act be committed with malice or ill-will, or even with the slightest wrongful intention. Nor is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard": *Comer v. Knowles*, 17 Kan. 436.

The placing of a person against his will in a position where he cannot exercise his will in going where he may lawfully go, and detaining him at the will of another, without lawful authority, is false imprisonment: *Robinson v. Green* (Ala.), 43 South. 797; *Dunlevy v. Wolferman*, 106 Mo. App. 46, 79 S. W. 1165. And false imprisonment may consist in preventing a person from going in any direction he sees proper without detaining him in any particular spot: *Woods v. State*, 3 Tex. Cr. App. 204; *Harkins v. State*, 6 Tex. Cr. App. 452. Any deprivation of the liberty of another without his consent, whether by violence, threats, or otherwise, constitutes an imprisonment, within the meaning of the law: *Miller v. Ashcraft*, 98 Ky. 314, 32 S. W. 1085; *Bernheimer v. Becker*, 102 Md. 250, 111 Am. St. Rep. 356, 62 Atl. 526, 3 L. R. A., N. S., 221. It will not be seriously contended, we assume, that to constitute an unlawful arrest, forming a basis for an action for false imprisonment, there must be an application of actual force, or manual touching of the body, or such physical restraint as is visible to the naked eye. Such is not the law, and all of the authorities agree that such an arrest may be made either with or without a manual or actual touching: *McAleer v. Good*, 216 Pa. 473, 116 Am. St. Rep. 782, 65 Atl. 934, 10 L. R. A., N. S., 302. To constitute a false imprisonment where no actual force or violence is employed, the submission must be to a reasonably apprehended force: *Johnson v. Tompkins*, 1 Baldw. 571, Fed. Cas. No. 7416; and the circumstance merely that one considers himself restrained in his person is not sufficient to constitute a false imprisonment, unless there is in fact a reasonable ground to apprehend a resort to force upon an attempt to assert one's liberty: *McClure v. State*, 26 Tex. App. 102, 9 S. W. 353. Though the manual seizure of a person is not necessary to his unlawful arrest, there must be some sort of personal coercion to constitute a false imprisonment: *Hill v. Taylor*, 50 Mich. 549, 15 N. W. 899. Though in general no actual force or compulsory seizure is necessary to constitute an unlawful arrest and false imprisonment, there must be words or acts done toward the person to be arrested clearly showing an intention to arrest, and his submission must be to a threatened and reasonably apprehended force: *Greathouse v. Summerfield*, 25 Ill. App. 296. Whatever means are employed, they must be such as operate to restrain or coerce the plaintiff in point of fact, and there is no restraint when he of his own free choice and volition remains where he is, with liberty to depart if he pleases: *Kirk v. Garrett*, 84 Md.

383, 35 N. W. 1089. There is no imprisonment where the officer purporting to make the arrest merely informs the person to be arrested of his business, but neither takes him into custody nor in any way deprives him of his freedom of action: *Hill v. Taylor*, 50 Mich. 549, 15 N. W. 899. If an officer merely asked the plaintiff if he did not want to go to the courthouse with him, the officer saying nothing showing an intention to arrest, having no authority to arrest, and not pretending to have any, the plaintiff knowing that he was not arrested, and that he did not have to go with the officer unless he wished to do so to clear himself of a suspicion against him, there was no false imprisonment: *Greathouse v. Summerfield*, 25 Ill. App. 296. Or if a police officer, in the discharge of his duty, in good faith, invites a person to police headquarters for the purpose of questioning him and investigating a charge against him, with a view of deciding on future action, and without any then intention of putting him under arrest or restraint, the circumstances do not warrant a reasonable apprehension that force will be used in the absence of submission, and if the person voluntarily accompanies the officer and consents to be searched, there is no arrest or false imprisonment: *Gunderson v. Struebuig*, 125 Wis. 173, 104 N. W. 149.

II. Necessity for Actual Force.

To constitute a false imprisonment, it is not necessary that manual force should be actually employed; it is sufficient if the person yield against his will to the force threatened: *Ahern v. Collins*, 39 Mo. 145. To constitute a false imprisonment, it is not necessary that the defendant use force or violence, or lay hands on the plaintiff, or confine him in any jail or prison, but it will suffice if the defendant at any place or time in any manner restrain the plaintiff of his liberty, or detain him in any manner from going where he wishes, or prevent him from doing what he desires: *Hawk v. Ridgway*, 33 Ill. 473. To constitute the offense of false imprisonment, no actual force is necessary; it is sufficient if the opposition to the prosecutor's going forward is such that a prudent man would not take the risk of doing so: *Smith v. State*, 7 Humph. 43. An actual manual arrest is not necessary to constitute this offense, and an actual demonstration of physical violence, which to all appearances can only be avoided by submission, operates as effectually, if submitted to, as if the arrest or detention had been forcibly accomplished: *Brushaber v. Stegemann*, 22 Mich. 266; *Hildebrand v. McCrum*, 101 Ind. 61.

A manual touching of the body or actual arrest by force is not necessary to constitute an arrest and imprisonment, and it is sufficient if the person be within the power of the officer and submits to the arrest: *Greathouse v. Summerfield*, 25 Ill. App. 296; *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480; *McAleer v. Good*, 216 Pa. 473, 116 Am. St. Rep. 782, 65 Atl. 934, 10 L. R. A., N. S., 302. If a person is constantly guarded by detectives without any warrant, and

all of his movements are under their control, he being repeatedly urged to confess his guilt and examined in regard to a robbery in such manner as to clearly show that he is regarded as a criminal, and that, if necessary, force will be used to detain him, he is unjustifiably deprived of his liberty: *Fotheringham v. Adams Express Co.*, 36 Fed. 252, 1 L. R. A. 474. Or if an officer, having in his possession an insufficient complaint and warrant for plaintiff's arrest, stops him by speaking to him while he is driving along the road and reading the paper to him, tells him that he will have to go with him, and such officer follows the plaintiff, both going together to the place of trial, the plaintiff understanding that he was in the officer's custody, these facts constitute a sufficient restraint to establish false imprisonment: *Goodell v. Tower*, 77 Vt. 61, 107 Am. St. Rep. 745, 58 Atl. 790.

If a saleswoman in a store, after showing plaintiff some watches, counted them and said "There was so many in the case when I showed them to you; now there is one missing," and then called the floorwalker, the latter calling a woman detective, who said that plaintiff would have to be searched; and such detective and a man then conducted plaintiff between them through the store to an elevator, and took her upstairs into a small room. where she was searched, these facts are sufficient to show that plaintiff did not willingly submit to be searched, that she was unlawfully restrained of her liberty, and that, under the circumstances, she was not required to offer physical resistance to an attempt to search her: *Stevens v. O'Neil*, 51 N. Y. App. Div. 364, 64 N. Y. Supp. 663. In *Moore v. Thompson*, 92 Mich. 498, 52 N. W. 1000, the facts relied upon to constitute a false imprisonment were that the plaintiff, in a physician's office, was accused of having stolen certain articles from her former employer, and was told at the time that an officer was at hand to arrest her if she did not produce the missing articles. The plaintiff protested her innocence, and started toward the door as if to go out, when her accuser placed himself between plaintiff and the closed door with his hand on the knob. When plaintiff refused to go through the streets to her home to be searched and permit her home to be searched, she was taken there in a carriage and a search was made. These circumstances, it was maintained, justified a finding that there had been an imprisonment, and that the fact that plaintiff made no forcible attempt to escape was immaterial.

III. Threats.

False imprisonment may be effected by means of threats alone, without any avowed restraint, and though the person injured made no effort to escape the detention, except by verbal depreciation: *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291, 7 L. R. A., N. S., 576; *Herring v. State*, 3 Tex. Cr. App. 108. Nor is it necessary, to constitute false imprisonment, to prove express verbal threats; they

may consist of acts, gestures, or the like: *Maner v. State*, 8 Tex. Cr. App. 361. Any deprivation of the liberty of another without his consent, whether by violence, threats or otherwise, constitutes an imprisonment within the meaning of the law; and if wrongful, constitutes false imprisonment: *Miller v. Ashcroft*, 98 Ky. 314, 32 S. W. 1085; *Bernheimer v. Becker*, 102 Md. 250, 111 Am. St. Rep. 356, 62 Atl. 526, 3 L. R. A., N. S., 221; *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95. It is false imprisonment to detain another by threats of violence to his person, or deprive him of the freedom of going where he will, by a well-grounded apprehension of personal danger, though no assault is made: *Johnson v. Tompkins*, 1 Baldw. 571, Fed. Cas. No. 7416. If one locks another up in a room and by threats of violence, with weapon in hand, compels him to confess that he has made and violated a certain promise of marriage, and extorts from him an agreement to pay a sum of money for the breach thereof, he is guilty of false imprisonment: *Hildebrand v. McCrum*, 101 Ind. 61. Or if one confines another in a corn crib, and drawing a revolver threatens to keep him there until he is as cold as the grave, unless he answers certain questions propounded to him, these acts constitute a false imprisonment: *McNay v. Stratton*, 9 Ill. App. 215. But if one person, by misrepresentation, threats of a criminal prosecution, and the payment of money for expenses, but without using or threatening force, induces the plaintiff to go to another place and remain in concealment for a time, the defendant is not guilty of false imprisonment: *Payson v. Macomber*, 3 Allen, 69.

“It is not necessary, to constitute false imprisonment, that the person restrained of his liberty should be touched or actually arrested; if he is ordered to do, or not to do, the thing, to move or not to move, against his own free will, if he is not left to his own option, to go or stay where he pleases, and force is offered or threatened, and the means of coercion are at hand ready to be used, or there is reasonable ground to apprehend that coercive means will be used if he does not yield, a person so threatened need not wait for its actual application. His submission to the threatened and reasonably to be apprehended force is no consent to the arrest, detention or restraint of the freedom of his motion—he is as much imprisoned as if his person were touched, or force actually used; the imprisonment continues until he is left at his own free will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease, and the means of affecting it are removed”: Per Mr. Justice Baldwin in *Johnson v. Tompkins*, 1 Baldw. 571, Fed. Cas. No. 7416.

IV. Words Alone.

Words alone are sufficient to constitute a false imprisonment, if they impose a restraint upon the person, who is accordingly re-

strained: *Pike v. Hanson*, 9 N. H. 491. False imprisonment may be committed by words alone, or by acts alone, or by both, by merely operating on the will of the individual to the restraint of his liberty: *Comer v. Knowles*, 17 Kan. 436; *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291. False imprisonment is any unlawful restraint of a man's liberty, and may be by words and an array of force without bolts and bars: *Marshall v. Heller*, 55 Wis. 392. Words alone are frequently sufficient to bring about the actual constraint of liberty and constitute a false imprisonment: *Dunlevy v. Wolferman*, 106 Mo. App. 46, 70 S. W. 1165.

SEARS v. MAYOR AND COUNCIL OF ATLANTIC CITY.

[73 N. J. L. 710, 64 Atl. 1062.]

MUNICIPAL CORPORATIONS—Notice to Precede Judicial Ordinances.—An ordinance, judicial in its nature, passed without notice to those property owners affected by its provisions, is invalid. (p. 725.)

MUNICIPAL CORPORATIONS—Judicial Ordinances, What are—Paving Streets.—An ordinance requiring the paving of a public street and imposing the burden of the cost thereof upon the real estate benefited thereby to the extent of the benefit received, is judicial in its nature. (p. 726.)

G. A. Bourgeois, and B. C. Godfrey, for the plaintiffs in error.

C. L. Cole, for the defendants in error.

711 GUMMERE, C. J. A certiorari allowed in this case brought into the supreme court for review an ordinance of the common council of Atlantic City, requiring that a designated portion of Atlantic avenue be paved with asphalt, or bitulithic pavement, and directing that the cost of such improvement should be assessed upon the land and real estate benefited thereby, to the extent of the benefit received. It was held by the supreme court that the ordinance was invalid, because it was passed without notice to those property owners who were affected by the provision which directed an assessment for benefits to be made. The soundness of that decision depends upon the character of the ordinance under review. If it be judicial, then the failure to give notice was fatal to its validity; if it be legislative, then such failure has no effect upon the validity of the ordinance. This is the settled rule under our decisions.

The true test to be applied in determining whether an ordinance which directs the making of a municipal improvement is ministerial or judicial in its character, seems first to have been pointed out, so far as our decisions are concerned, by Chief Justice Green, speaking for the supreme court, in the case of *Camden v. Mulford*, 26 N. J. L. 49. He there states the principle to be that ordinances which direct the mere repaving or repairing of streets, acts which are imposed upon municipal corporations as matters of duty, are purely ministerial; but that ordinances which require the paving of streets, not as a matter of ordinary repair, but upon specified conditions only, and impose the burden thereof, not only upon the city treasury, but upon a specific class of individuals, are in their nature judicial. The application of ⁷¹² the principle led to the overthrow of the ordinance then under review, which imposed upon abutting owners the cost of paving a city street, and which was passed without notice first having been given to them.

Since the decision of the cited case, in 1856, the principle established by it has always been accepted by our courts as furnishing the test for determining the character of an ordinance providing for a municipal improvement. In *Vannatta v. Morristown*, 34 N. J. L. 445, the test was applied by the supreme court to an ordinance directing the alteration of a grade line of one of the streets of a town, the court declaring that "the distinction is between those ordinances which adopt a general system of policy affecting all the inhabitants of a city or town, or the property situate in the corporate limits, directing the execution of mere public duties, the burthen of which is borne by all equally, and those which provide for the making of an improvement affecting property in one locality, the cost of which is to be defrayed by certain specified individuals. . . . With respect to this latter class, the adoption of an ordinance directing the improvement to be made is a judicial act affecting those individuals, and they are entitled to be heard before the ordinance is passed which adjudges the necessity or expediency of the proposed improvement and directs it to be made." In the cases of *Boice v. Plainfield*, 38 N. J. L. 95, *Stretch v. Hoboken*, 47 N. J. L. 268, *West Jersey Traction Co. v. Board of Works*, 56 N. J. L. 431, 29 Atl. 163, and *Landis v. Vineland*, 60 N. J. L. 264, 37 Atl. 625, the supreme court reiterated the principle promulgated in *Camden v. Mulford*, and made the test furnished by it the basis

of its decision. In the case of *West Jersey Traction Co. v. Board of Works*, 56 N. J. L. 431, 29 Atl. 163, Justice Reed thus states the distinction between municipal acts which are ministerial and those which are judicial in their character: "A legislative (ministerial) act is one which prescribes a general rule of conduct, while a judicial act is one which imposes burdens, or confers privileges, in specific cases, according to the discretionary judgment of some person or board as to the propriety of imposing the burden, or granting the privilege, ⁷¹⁸ in the specific case." The judgment rendered in the supreme court in this case was afterward affirmed, and its opinion adopted as the opinion of this court sub nom. *Camden Horse R. R. Co. v. West Jersey Traction Co.*, 57 N. J. L. 710, 34 Atl. 1134.

In the case of *Moore v. Haddonfield*, 62 N. J. L. 386, 41 Atl. 946, this court had under consideration the validity of a municipal ordinance which fixed the location of the tracks of the West Jersey Traction Company in certain of the borough streets. Justice Garrison, who delivered the opinion of the court, after pointing out that the matter to be inquired of was whether the municipal action was legislative or judicial in its character, declared that an examination of our decisions would show that where personal property, or personal rights, are clearly involved, the rule is plain, and that in case the municipal action then under scrutiny imposed an additional burden upon the land of abutting owners it was judicial in its character. He then proceeds to point out that the ordinance affects only public rights, and imposes no burden upon abutting land owners, and for this reason declares the ordinance valid.

The rule established by this line of cases is so firmly imbedded in our jurisprudence as to be no longer debatable. The only question is its applicability to the given case. The ordinance now under review imposes upon abutting property the cost of paving Atlantic avenue, to the extent to which the improvement benefits that property, and it is argued that this fact differentiates the present case from those which have been cited, for the reason that the ordinance places no burden upon abutting property, because it furnishes to the owner an equivalent, in the benefit conferred, for the imposition which is placed upon it. But this contention overlooks the basis upon which the rule rests. Where the abutting owners were compelled to bear the whole expense of the improvement, they

received, always, a partial, and sometimes a full, equivalent for the burden imposed—a partial equivalent where the benefit was less than the amount assessed against the property, a full equivalent where the assessment was no greater ⁷¹¹ than the benefit received. But no distinction has been made in the decisions between cases of the one kind and the other. The question whether the benefit received was less than the burden imposed never has been considered as having any bearing in determining whether the ordinance which required the making of the improvement was legislative or judicial in its character. On the contrary, the fact that it imposes a burden upon the abutting land has been the only test, without regard to whether the benefit conferred was, or was not, an equivalent for the burden imposed. The test furnished by the rule must be accepted as an inherent part of the rule itself. Its application renders the ordinance under consideration invalid.

The judgment of the supreme court must be affirmed.

Proceedings for Street Improvements require notice and opportunity for hearing, to warrant the imposition of a charge by due process of law, where the cost of the improvement is to be apportioned among those benefited. An ordinance is unconstitutional which authorizes an assessment, but makes no provision for notice to the owners of the property assessed, and affords them no opportunity to be heard concerning the correctness of the assessment: *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637.

BRENNAN v. UNITED HATTERS OF NORTH AMERICA, LOCAL No. 17.

[73 N. J. L. 729, 65 Atl. 165.]

CONTRACTS—Public Policy—Right to Recover on Independent Ground.—If a person has entered into a contract, void because contrary to public policy, his right to recover upon a ground of action that exists independent of the contract is not overthrown by the operation of the maxim *in pari delicto*. (p. 736.)

TRADE UNIONS—Unlawful Expulsion—Damages.—If the suspension of a member from a trade union and the consequent withdrawal of his membership card are not warranted by the laws of the association, because the tribunal that tried him acted without jurisdiction and without his consent as required, and such act results in the loss to him of his employment and resulting actual damage, he is entitled to recover therefor from such association. (p. 737.)

CONSTITUTIONAL LAW—Right to Engage in Business or Labor.—The liberty of the citizen entitles every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellowmen, saving such as may result from the exercise of equal or superior rights on their part. (p. 739.)

CONSTITUTIONAL LAW—Right to Contract.—As a part of the constitutional right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services, which amount to the purchase and sale of labor. (p. 739.)

MASTER AND SERVANT—Procuring Discharge of Employé. Anyone intentionally and without legal justification procuring an employer to discharge his employé is liable to an action for damages at the suit of the latter, although there was no binding contract of employment. (p. 739.)

MALICE IN LAW Means nothing more than the intentional doing of a wrongful act without justification or excuse, and a wrongful act in this connection is any act which will in the ordinary course infringe upon the rights of another, to his damage, except it is done in the exercise of an equal or superior right. (pp. 740, 741.)

Riker & Riker, for the plaintiffs in error.

Howe & Davis, for the defendant in error.

730 PITNEY, J. This was an action of tort brought to recover damages sustained by the plaintiff through interference by the defendants with his employment in his trade as a hatter. Plaintiff was a member of Local Union No. 17 of the United Hatters of North America. The defendants are this local union (sued, under Pamph. Laws 1885, p. 26, as a voluntary association consisting of more than seven members) and twelve individuals, one of whom was the secretary of the union, and the other eleven constituted a committee thereof, known as the "vigilance committee."

The plaintiff's declaration contains three counts, of which the first indicates the ground of recovery that is established by the verdict. It alleges, in substance, that plaintiff was a member of the "United Hatters of North America, Local No. 17," and was employed by a firm of E. V. Connett & Company, in the trade and occupation of the manufacture of hats, in the capacity of foreman; that he was authorized, under the constitution and by-laws of the United Hatters, to act in such capacity, and was enjoying the benefit of a membership card, issued by that association, certifying to his good standing; that the association and the individual defendants constituting its vigilance committee, in order to
731 injure the plaintiff in his said trade and occupation, on

August 6, 1902, maliciously and without reasonable or probable cause, pretending that plaintiff had violated the laws of the defendant "United Hatters of North America, Local No. 17," and without serving the plaintiff with written charges of the alleged violation, and without giving him notice of the hearing of said charges, adjudged the plaintiff to be guilty thereof, and directed that a fine of five hundred dollars be levied upon him; that afterward, on September 4, 1902, at a meeting of the defendant "United Hatters of North America, Local No. 17," the decision of the defendants adjudging the plaintiff guilty as aforesaid was reversed and set aside; that by reason of the plaintiff's refusal to pay the said fine the defendants withdrew from him the benefit of his membership card, by means whereof the said Connett & Company were compelled to, and did, refuse to continue the plaintiff in their employ, as they otherwise would have done, and by reason thereof the plaintiff was prevented from exercising his trade and occupation of a hat manufacturer and from obtaining any engagement or employment therein. As to this count the defendants pleaded the general issue—not guilty.

A trial being had before the judge of the Essex circuit court and a jury, there was a general verdict in favor of the plaintiff, and the consequent judgment is now before us for review. The assignments of error relate to certain rulings of the trial judge that are evidenced by bills of exceptions.

It appears that plaintiff was a member in good standing of the United Hatters' union, and was working in Connett's factory as one of several hundred men, all of whom belonged to the same union. He was a foreman, in receipt of eighteen dollars per week as wages. By the rules of the union no man could be employed in such a shop unless his membership card or check was on deposit with the shop steward, who was an agent of the union at the factory. By the same rules members of the union were not permitted to work in the shop together with any man who was not a member of the union or not in possession of his card. The union included within its jurisdiction ⁷³² about two thousand two hundred men, employed in about fifteen different factories, situate in a district comprising Orange, Hackettstown, Bloomfield, Millburn and Livingston. All the hat factories in this district were under the jurisdiction of the same union. By an agreement made between the union and the manufacturers, every man

employed in any of these factories must have a membership card on deposit with the shop steward.

It appears that by the rules of the union the association has power to fine and reprimand or otherwise punish any member violating the laws of the association or the rules of trade. The vigilance committee has power to transact any business pertaining to the welfare of the trade in the time intervening between the regular meetings of the union. By the rule relating to "Trial and Appeal," it is provided as follows: "Any member of this association shall be entitled to due notice and a fair trial upon being accused of any violation of its laws or the rules of trade, but no member shall be put on trial unless charges are submitted in writing by a member of the association."

It appears that on August 5, 1902, a meeting of the vigilance committee was held, at the instance of two members of the association named Sereno and Alvino, to investigate a complaint made by them on the authority of Foreman Brennan (the plaintiff herein) against one Trancone, to the effect that Trancone had accused them (Serena and Alvino) of lying in wait around Brennan's house for the purpose of doing him some injury. Brennan was called before the meeting as a witness. Trancone appears to have been present as the party accused. Each was examined by the committee in the absence of the other. It appears from the minutes that in the course of the investigation Trancone stated to the committee (in Brennan's absence) that he himself had on several occasions paid Brennan small sums of money "to get good work," and that one Panegrasso had given money to Brennan for the same purpose. Trancone having retired from the presence of the committee, Brennan was recalled, ⁷³³ and the statement made by Trancone before the committee was read to him. Brennan denied it. The committee then called Trancone before Brennan to verify his statement. Trancone declared that his statement was true in every particular, and Brennan again denied the charge. Subsequently, at the same meeting, Panegrasso came before the committee, under escort of Brennan, "as a witness to prove that Trancone lied." Trancone was recalled and reaffirmed his accusation in the presence of Brennan, Panegrasso and the committee. Thereupon all parties were notified to appear before the committee on the following afternoon (August 6th). Upon that date another meeting of the vigilance committee

was held, concerning which the minutes disclose only the following: "Timothy Brennan's case was then taken up, and Michael Panegrasso was called before the committee to answer the charge that he had ever given money to Brennan. He denied that he had ever given money to Brennan. Mr. Brennan was called and admitted having met Panegrasso in Bloomfield. Motion that Michael Panegrasso and Benedetto Trancone be fined the sum of \$500 each, \$250 down and \$5 per week, carried. Motion that Mr. Brennan be fined the sum of \$500, \$250 down and \$1 per week, and to give up his place as foreman for the space of one year in Connett's hat factory, carried unanimously."

This action of the vigilance committee was reported to a meeting of the association held on the following day (August 7th), and a motion was carried that the report be adopted as read. It should be observed that this ratification by the association of the action of its committee is not mentioned in the plaintiff's declaration herein. In order to sustain the judgment under review, the declaration will be treated as amended, if necessary, in this regard.

On August 15th the secretary of the union (who is one of the defendants herein) went to Connett's hat factory, where Brennan was working, explained to him the action taken by the vigilance committee and by the meeting of the association, and demanded payment of the two hundred and fifty dollars. Brennan refused to pay ⁷³⁴ it, and the secretary thereupon went to the shop steward and took Brennan's check from the box. It is inferable from the evidence that this was done by the secretary in the regular course of his duty, and that in doing it he acted as agent for the association.

Afterward, and on the same day, Brennan's counsel wrote to the union, protesting against the action taken, on the ground that no charges had been preferred nor any notice of a trial or hearing given to him, as required by the laws of the association. Subsequently, and under date of August 17th, a charge was preferred in writing by Trancone, and Brennan was notified of a hearing before the vigilance committee to be held on the 18th. He declined to attend on the ground that he could not appear legally until his card was returned to him, and on the further ground that members of the vigilance committee had made public statements showing that they were prejudiced against him.

At a meeting of the association held on September 4th a motion that Brennan be exonerated was carried by a two-thirds vote. Shortly thereafter his card was returned to him and he went back to work in the Connett factory.

On August 15th, a few minutes after the secretary of the union took up Brennan's membership card, he was discharged by the head foreman on the ground that Brennan no longer had his check in the box. Upon being exonerated by the union, Brennan informed the head foreman of the fact, and was immediately re-employed.

The trial judge, having denied a motion for nonsuit made at the close of the plaintiff's case, and a motion for direction of a verdict in defendants' favor made at the close of the whole case, submitted the issue to the jury, with instructions to the effect that if they found the plaintiff had sustained damage from the acts of the defendants in the premises, and if the vigilance committee proceeded against the plaintiff without charges submitted in writing, without notice to the plaintiff, or without fair trial, then, unless the plaintiff had waived his rights by submitting himself to the jurisdiction ⁷³⁵ of the vigilance committee or of the association, he was entitled to recover to the extent of the pecuniary injury that was the natural result of the action of the defendants. Other and more questionable elements of damage were included in the instructions, but any ground of complaint in this regard was waived upon the argument here.

Reversal is asked upon only two grounds, both of which are assumed to have been raised in the motion for nonsuit and for direction of a verdict, viz.: First. That the suspension or expulsion of a member of a labor union (it being a voluntary, unincorporated association), in cases where no property rights are involved, cannot support a claim for damages against the union by the member so expelled or suspended. And, secondly, that the plaintiff had no right to complain of his trial and consequent suspension, and this on the ground that the charge made by Trancone against him was put in writing and read to the plaintiff; that he participated in the trial before the vigilance committee and produced witnesses who testified in his behalf; that he received notice of the hearing before the committee upon the second day, at which hearing he attended, with witnesses, and was tried in accordance with the rules and by-laws of the association; and that he waived any formalities that may not have been strictly

observed by failing to object to the proceedings for irregularity.

To deal with the second point first. We make no question that the subject matter of the charges—the acceptance from a workman of a bribe, intended to secure favorable terms of employment—involving, manifestly, a gross breach of Brennan's duty to his employer, as well as to his fellow employes, and involving moral turpitude as well, was within the jurisdiction of the vigilance committee, although no written rule is cited to that effect. But jurisdiction of the subject matter was not alone sufficient to entitle the committee to proceed. According to the express requirement of the by-laws of the association, jurisdiction over the person of the party accused must first be acquired by the submission of written charges ⁷³⁶ and the giving of due notice to the accused. By "due notice" is meant, of course, notice that he is to be put upon trial at a specified time upon specified charges, and the notice must be given in season to afford him a reasonable opportunity to make preparation to meet the charges by summoning witnesses in his behalf. The by-law likewise entitles the member accused to "a fair trial." Just what this phrase imports, and how far and under what circumstances the courts of law could properly ignore the results of a trial had under such a by-law, on the ground that it was not a fair trial, we find it unnecessary to determine. For we are of opinion that, clearly, the plaintiff in the case at hand was put upon trial without charges submitted in writing by a member of the association, and without due notice, such as are prescribed by the by-laws of the association. It results, therefore, that the vigilance committee acted without jurisdiction unless plaintiff by his own conduct consented that they should proceed. With respect to his consent, there was, we think, at least a disputable question for the jury's determination. It is clear enough that at the meeting of August 5th the plaintiff was informed that Trancone had made an accusation reflecting upon his integrity. But Brennan was then present as a witness respecting a charge that had been made against Trancone, and he may well have supposed that Trancone's accusation against him was under consideration by the committee solely as it affected his credibility as a witness. It is not clear that Brennan knew, on the 5th, that the committee meeting appointed for the following afternoon was to take up Trancone's accusation as a basis of

action against him (Brennan). So far as the proceedings of August 6th are concerned, it does not appear that Brennan was then notified that the committee had his case under consideration.

It is suggested that Brennan, by an appeal to the association, taken after his discharge from the Connett factory, submitted himself to the jurisdiction. The grounds of this appeal and the circumstances under which it was taken do not appear, nor does it clearly appear that any formal appeal⁷³⁷ was taken. If taken, the appeal may be presumed to have been based upon the ground that the vigilance committee had acted without jurisdiction, so that the whole proceedings were void. It certainly cannot be held that by the mere taking of an appeal to the association he assented to the jurisdiction of the very tribunal whose proceedings were to be reviewed.

To return, now, to the first and main question raised by plaintiff in error. We think too narrow a view is taken of the plaintiff's ground of action when it is regarded as resting merely upon his suspension from the labor union. In our opinion, the gist of the action is the damage caused to the plaintiff by an unwarranted interference with him in his employment as a hatter. If the framer of the declaration, instead of including in that pleading averments respecting the proceedings of the vigilance committee and of the other defendants that eventuated in the withdrawal of the plaintiff's membership card, had contented himself with averring that defendants had unlawfully and without just cause or excuse procured plaintiff's discharge by his employer, it would, as we think, have set forth the material averment upon which his right of action depends. Defendants might then have pleaded that his discharge resulted solely from the withdrawal of his membership card, and that this resulted from his conviction of an offense against the rules of trade, after a fair trial had upon charges submitted by a member in writing, and on due notice to the plaintiff in accordance with the laws of the association of which he was a member. This course of pleading would have presented the so-called trial and conviction of the plaintiff in its true light, as an alleged justification or excuse for the action of the defendants in procuring his dismissal from employment.

No doubt plaintiff's membership in the defendant association imports his consent (so far as he had lawful power to

give consent) to the discipline of the association, if carried out in good faith and without malice, through the methods prescribed by the laws of the association and in accordance with the principles of natural justice. Assuming the defendant association to have been organized for lawful purposes ⁷³⁸ only, plaintiff had lawful power to give his consent to its discipline, to be exercised in furtherance of such purposes. And, assuming that the method adopted by the defendant association of establishing an agreement with the manufacturing hatters in all the factories throughout an extensive district, to the effect that none but members of the association should be employed in their shops, was not unlawful, the plaintiff might assent that upon his being in due course suspended from membership in the association, after a proper conviction upon charges submitted and tried in accordance with its rules, he should lose his place of employment and his opportunity of gaining other employment within the district.

We say *assuming* such an agreement not to be unlawful because in our view its lawfulness admits of question. In *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802, certain brewery companies in the city of Rochester, having formed themselves into a brewers' association, made an agreement with a labor union, composed of workmen employed in the brewing business in that city, to the effect that all employés of the brewery companies should be members of the union, and that no employé should work for a period longer than four weeks without becoming a member. It was held (as we read the opinion) that the purpose of the union, that no employé of a brewing company should be allowed to work without becoming a member of the union, and that the contract referred to should be availed of to compel the discharge of an independent employé, was, in effect, a threat to keep persons from working at the particular trade and to procure their dismissal from employment; and that this plan of compelling workmen, not in affiliation with the organization, to join it at the peril of being deprived of their employment and of the means of making a livelihood, was unlawful. In the more recent case of *Jacobs v. Cohen*, 183 N. Y. 207, 111 Am. St. Rep. 730, 76 N. E. 5, 2 L. R. A., N. S., 292, a contract between a single firm of employers and a labor union, whereby the firm agreed for a certain period to employ and retain only members of

the union, and the latter for the same period bound themselves to furnish the services of its members, was ⁷³⁹ held not violative of public policy, on the ground, among others (see page 211), that "its restrictions were not of an oppressive nature, operating generally in a community to prevent such craftsmen from obtaining employment and from earning their livelihood." Whether these decisions are consistent with each other is a question that may require consideration at a future time. At the same time, *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135, may come under consideration. *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339, *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603, and many of the cases cited below, may also throw light upon the lawfulness of such a trade agreement.

In the present case, indeed, it is argued, and with much force, by the learned counsel for plaintiff in error, that the value of the right of membership in the defendant association consists in participation in a more or less complete monopoly of the labor market in the particular trade in question; that so far as labor unions are organized for the purpose of monopolizing to their members the labor market in any particular trade, that purpose constitutes such unions unlawful associations, and that the plaintiff's right to retain employment or to secure new employment was so dependent upon his participation in such an unlawful monopoly that his suit for damages arising out of a disturbance of this right is not to be sustained.

This argument has an old sound, proceeding as it does from the labor organization itself, for if the purposes of the defendant association, as disclosed in the record before us, be in truth unlawful, that circumstance does not, in our view, tend to overthrow the judgment under review. The plaintiff's right of action, as we regard it, does not rest upon any assertion of the alleged monopoly, but upon a repudiation of the very course of procedure that was invoked in his case to establish the monopoly. It is settled that where a party has entered into an agreement that is void because contrary to public policy, his right to recover upon a ground of action that exists independent of the agreement is not overthrown ⁷⁴⁰ by the operation of the maxim in *pari delicto*: *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847, and cases cited; *Easton*

Nat. Bank v. American Brick and Tile Co. (Green's appeal), decided by this court in June last; see, also, Delaware etc. R. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Am. St. Rep. 442, 19 Atl. 178, 7 L. R. A. 435; Newbury v. Luke, 68 N. J. L. 189, 52 Atl. 625.

But the question thus argued by counsel for plaintiff in error does not, as we take it, press for determination in this case. Had plaintiff's discharge from employment resulted from a due course of procedure had against him in the association, in accordance with the by-laws to which he had given his consent, and had such procedure been set up as a justification or excuse for those who procured his discharge, he might have raised the question of the unlawfulness of the trade agreement with the manufacturing hatters in order to show that the alleged excuse or justification was not a lawful one.

But since upon the record before us it must be held that plaintiff's suspension from the association and the consequent withdrawal of his membership card were not warranted by the laws of the association, because the tribunal that tried him acted without jurisdiction, it is unnecessary to pursue the inquiry whether the defendant association, by establishing a trade agreement that tended to promote a monopoly and to deprive workmen in the hatter's craft of a fair opportunity to obtain employment, had violated the law or the public policy of this state.

Stripped, therefore, of all redundant matters, the question presented is whether the acts of the defendants, including the unwarranted conviction of the plaintiff by the vigilance committee, their sentence that he should pay a money fine and give up for one year his position as foreman in the Connett factory, the ratification of this conviction and sentence by the defendant association, and the consequent withdrawal of plaintiff's membership card from the steward at the factory, when the natural and proximate result of that course of action, intended and designed by the defendants to ensue, was ⁷⁴¹ to interfere with the plaintiff's continued employment in the factory, and thereby prevent him from gaining a livelihood for himself and his family, followed by actual damage accruing to the plaintiff in the premises, constitute an actionable injury.

We say that the natural and proximate result of withdrawing the plaintiff's membership card was his dismissal from

the factory, because such was not only a reasonable inference to be drawn by the jury from the evidence, but indeed was the only reasonable inference. Upon the evidence, the membership card was the token, and the only token, that manifested plaintiff's right to continued employment in the factory under the trade agreement already referred to. That agreement was not of itself the proximate cause of his dismissal, but merely produced the condition under which the withdrawal of the card became effective in procuring his dismissal. The evidence is clear that it was because of the withdrawal of the card, and for that reason only, that the superintendent of the factory discharged the plaintiff, and that his refusal to do so would at once have put the factory out of business by the refusal of all the other men to continue at work. We say, also, that the plaintiff's discharge was intended and designed by the defendants to ensue. It is true that the immediate occasion of the withdrawal of the card was plaintiff's refusal to pay the fine. But that fine having been unwarrantably imposed upon him, he of course was justified in refusing to pay it. And since the defendants were charged with notice of the facts that show the fine was unwarranted, they were not entitled to anticipate that the plaintiff would submit to pay it. Moreover, a part of the penalty imposed, in addition to the fine, was that plaintiff should give up for one year his place as foreman in the factory. Defendants had no right to assume that plaintiff would be willing to continue in any other grade of employment, nor that the Messrs. Connett would give him other employment if the plaintiff were willing to accept it.

In dealing with the question of the plaintiff's right to ⁷⁴² recover, it is to be observed that the action taken by the defendants was not in the course of any legitimate competition for the place held by the plaintiff in the factory, but was taken in order to discipline and punish him for an offense of which he was presumably innocent, and of which he had not been duly found guilty.

The common law has long recognized as a part of the boasted liberty of the citizen the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow-men, saving such as may result from the exercise of equal or superior rights on their part—such, for instance, as the right of fair competition in the like field of human

effort—and saving, of course, such other hindrance or obstruction as may be legally excused or justified.

This right is declared by our constitution to be unalienable. The first section of the Bill of Rights sets forth that “All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.”

As a part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services, which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it. The cup of Tantalus would be a ⁷⁴³ fitting symbol for such a mockery. Our constitution recognizes no such notion.

Actions like the present, although they have been treated by some judges in recent years as a comparative novelty, do not, in our opinion, rest upon any novel principle. They are essentially analogous to the familiar action for enticing away one's servant. In such cases, as was said by Justice Van Syckel, in *Noice v. Brown*, 39 N. J. L. 569: “It is well settled that a person who, knowing the premises, induces another to break a subsisting contract of service, is liable to an action for the damages which ensue to the employer. Whether an action will lie when there is no binding contract to continue in service is perhaps not so clear; but I think it may be maintained, both upon reason and authority, where it is merely a subsisting service at will. In such service, like a tenancy at will, their relation must be ended in some way before the rights of the master can be lost. By the unwarrantable interference of a third party the employer is deprived of what he otherwise might have retained.”

In *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603, our supreme court sustained an action brought by a blacksmith on the ground that he had shod a mare for one of his customers, Van Riper, in a good and workmanlike manner; that the defendant, maliciously intending to injure plaintiff in his trade, did impair and destroy the work done and performed by the plaintiff upon the mare by loosening a shoe which was recently put on by the plaintiff, so that if the mare was driven the shoe would come off easily, and thus make it appear that the plaintiff was an unskillful and careless horse-shoer, and that the mare was not shod in a good, workmanlike manner, and thus deprive the plaintiff of the patronage and custom of Van Riper. Among the illustrative cases cited is *Keeble v. Hetheringill*, 11 East, 574n, the famous "decoy case."

In *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669, this court sustained an action against a single defendant for injuring the plaintiff's business by false and malicious statements concerning ⁷⁴⁴ his character. Many English cases were cited, among them *Lumley v. Gye*, 2 El. & B. 216, and *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; also the Massachusetts case of *Walker v. Cronin*, 107 Mass. 555. Justice Van Syckel said that "the rule to be deduced from the cases is that while a trader may lawfully engage in the sharpest competition with those in the like business, by representing his own wares to be better, . . . yet, when he oversteps that line and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damage results the injured party is entitled to redress. Nor does it matter whether the wrongdoer effects his object by persuasion or by false representation. The courts look through the instrumentality or means used to the wrong perpetrated with a malicious intent, and base the right of action upon that."

Our court of chancery, in *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881, *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152, and *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230, has affirmed the right of the citizen to conduct his business free from malicious interference, including his right to have free opportunity to hire employés. And we may remark that the right of one seeking employment to have free opportunity to gain employment and to retain a position of employment once it is gained,

is as precious in the eye of the law as the right of the employer.

The above cases illustrate the views that our courts have taken of cognate questions. We recall no case in this state that is precisely in point with the present.

In examining reported decisions in other jurisdictions, we frequently find the question of malice discussed—malice being commonly treated as an essential ingredient of an action like the present. But malice in the law means nothing more than the intentional doing of a wrongful act without justification or excuse: *Kink v. Paterson*, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705; *McFadden v. Lane*, 72 N. J. L. 724, 60 Atl. 365. And what is a wrongful act within the meaning of this definition? We answer, any act which in the ordinary course will infringe upon the rights of another to his damage is wrongful, except it be done in ⁷⁴⁵ the exercise of an equal or superior right. In *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, 613, Lord Justice Bowen said: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." This statement was cited with approval by Vice-Chancellor Green, in *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881. In our opinion it is a correct statement of the law, and is as applicable to acts affecting man's right to secure and retain employment as to his right to acquire and retain property or trade.

In *Walker v. Cronin*, 107 Mass. 555, the declaration averred that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers, and the defendant, knowing this, unlawfully and without justifiable cause, molested him in carrying on said business with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employ, and others who were about to enter into it, to abandon it without his consent and against his will, whereby the plaintiff lost their services and the profits that he would otherwise derive therefrom, and was put to expense to procure other workmen. The court sustained the right of action: See, also, *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, and *Berry v. Donovan*,

188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603, two recent and instructive cases.

A very recent Connecticut decision may also be noted—*March v. Bricklayers' and Plasterers' Union*, 79 Conn. 7, ante, p. 127, 63 Atl. 291, 4 L. R. A., N. S., 1198.

In *Bowen v. Hall*, [1881] 6 Q. B. Div. 833, it was held by the court of appeal that an action lies against a third party who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause, an injury to ⁷⁴⁶ such employer, although the relation of master and servant did not strictly exist between the employer and employé.

In *Temperton v. Russell*, [1893] 1 Q. B. Div. 715, a firm of builders had refused to obey certain rules laid down by the union with regard to building operations, whereupon the union sought to compel them to do so by preventing the supply of building materials to them. For this purpose they asked the plaintiff, who was a master builder supplying materials to the firm, to cease to supply them with such materials, but the plaintiff refused to do so. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with such request, the defendants induced persons who, to the knowledge of the defendants, had entered into contracts with the plaintiff for the supply of materials to break their contracts and not to enter into further contracts with the plaintiff, by threatening that the workmen would be withdrawn from their employ. The plaintiff having sustained damages in the premises, it was held that an action was maintainable by him against the defendants for maliciously procuring such breaches of contract, and also for maliciously conspiring to injure him by preventing persons from entering into contracts with him.

The celebrated case of *Allen v. Flood*, [1898] App. Cas. 1, is cited by the learned counsel for plaintiff in error herein. It arose in the year 1894 out of a dispute between certain boilermakers, members of a trade union which sought to assume to itself the sole control of the ironwork in shipbuilding, and certain members of the shipwrights' union who assumed the right to work in shipbuilding, whether upon woodwork or ironwork. Flood and Taylor, the plaintiffs, who were shipwrights, were employed by the Glengall Iron Company in repairing a ship, doing the woodwork thereon only, and no ironwork. Certain boilermakers, members of the boilermakers' union, on

discovering that the plaintiffs had previously been employed by another firm on the Thames in doing ironwork on a ship, threatened to strike. One of them telegraphed to London for the defendant Allen, who was the ⁷⁴⁷ walking delegate of the boilermakers' union. He came to the shipyard, and on being told that the iron men threatened to strike, he had an interview with the manager and foreman of the Glengall company, in which he informed the latter that unless Flood and Taylor were discharged, all the iron workers would be called out, or would knock off work (it was doubtful which expression was used); that the Glengall company had no option; that the iron men were doing their best to put an end to the practice of shipwrights doing ironwork, and that wherever Flood and Taylor were employed the iron men would cease work. There was evidence that this was done to punish Flood and Taylor for what they had done in the past. The Glengall company, in fear of this threat being carried out, which, as they knew, would have stopped their business, discharged Flood and Taylor and refused to employ them again.

Upon a trial of the action brought against Allen for the consequent damage, Justice Kennedy ruled that there was no evidence of conspiracy (there were other defendants besides Allen), or of intimidation or coercion on Allen's part, nor any evidence of breach of contract by the Glengall company in discharging Flood and Taylor, they having been engaged on terms that they might be discharged at any time. The jury found a special verdict to the effect that Allen maliciously induced the Glengall company to discharge Flood and Taylor, and not to re-engage them, and that each plaintiff had suffered damages. Thereupon judgment was entered for the plaintiffs. This decision was affirmed by the court of appeal (Master of Rolls Lord Esher, Lords Justices Lopes and Rigby). Allen appealed to the house of lords, and the case was argued first before Lord Chancellor Halsbury and Lords Watson, Herschell, Macnaghten, Morris, Shand and Davy. It was reargued before the same lords, with the addition of Lords Ashbourne and James of Hereford, in the presence of eight judges summoned to attend, viz., Hawkins, Matthew, Cave, North, Wills, Grantham, Lawrance and Wright. At the close of the arguments the following question was propounded ⁷⁴⁸ by the house of lords to the judges: "Assuming the evidence given by the plaintiffs' witnesses to be correct,

was there any evidence of a cause of action fit to be left to the jury?" The eight judges severally delivered opinions, six of them answering in the affirmative, the other two in the negative. Thereupon the house of lords by a vote of six (Watson, Herschell, Macnaghten, Shand, Davy, and James, of Hereford) against three (Halsbury, Ashbourne and Morris), reversed the judgment under review. But while those lords who voted to reverse did to some extent attempt to controvert the reasoning of Lord Halsbury and those who agreed with him, it is to be observed that they came to the conclusion reached on the ground that, although there was evidence of a cause of action fit to be left to the jury, they were constrained to ignore the evidence of intimidation on the part of Allen upon the ground that the trial judge had ruled it out of the case.

The decision has been explained, and its effect upon the present case practically overruled, as will be seen presently. But giving to it all the respect that it deserves, its weight as an authority in this jurisdiction depends, of course, upon such respect as the reasoning of the prevailing opinions may command, corroborated, so far as may be, by the weight of numbers. Upon the latter point it is significant that upon the main merits a majority of all the judges of England who considered the case were favorable to a recovery, including the trial judge, Kennedy; the lords justices of the court of appeal, Esher, Lopes and Rigby; six judges who sat with the lords, viz., Hawkins, Cave, North, Wills, Grantham and Lawrence, and three lords, including the lord chancellor (Halsbury, Ashbourne and Morris)—thirteen in all, while on the other side were the judges, Matthew and Wright, and six members of the house of lords, eight in all.

If we have correctly apprehended the essential grounds upon which proceeded the judgment of a majority of the house of lords in this case, the decision is not antagonistic to the plaintiff's right of action in the present instance. It seems to have been held that Allen's conduct amounted to ⁷⁴⁹ no more than legitimate persuasion; that he violated no legal right of Flood and Taylor; did no unlawful act and used no unlawful means in procuring their dismissal and that his conduct was therefore not actionable, however malicious or bad his motive might be. Such, indeed, is the abstract of the decision as contained in the syllabus. In the case before us, however, the defendants were not acting

within their legal rights, because, as already appears, even if the general object of the defendant association in respect of controlling the hatters' trade in the district covered by their operations be assumed to be lawful, yet their interference with the plaintiff in his occupation, in the manner in which they did interfere, was to be justified only in the event that plaintiff was first duly convicted and sentenced in accordance with the procedure prescribed by the laws of the defendant association, and this had not been done.

No doubt, however, there is much in the reasoning of the lords who voted for reversal in *Allen v. Flood*, [1898] App. Cas. 1, that, if accepted, would tend to negative a right of action in the present case. Time will not admit of an exhaustive review of that reasoning. We content ourselves with saying that it does not commend itself to us. We cannot agree that no legal right of Flood and Taylor was interfered with, because they had no legal right to insist upon their continued employment with the Glengall company. They were none the less entitled to the reasonable expectation that their employment would continue, and it did not lie in the mouth of one who, without warrant, had interfered with their status as employés to say that if he had not done so their employer might have terminated the status of his own accord. Nor can we agree that Allen was acting in the exercise of any absolute right. His rights, like all personal rights that are to be enjoyed in a state of society, were qualified to a material extent when they came into conflict with the rights of others. Without reviewing the elaborate opinions, it is sufficient to say that the general course of reasoning of those judges and lords who maintained the right of action is, to our minds, the more satisfactory.

⁷⁵⁰ *Allen v. Flood* is practically overruled by the decision of the house of lords in *Quinn v. Leathem*, [1901] App. Cas. 495, where it was held that a combination of two or more, without justification or excuse, to injure a man in his trade by enticing his customers or servants to break their contracts with him or not to deal with him or continue in his employment, is actionable if it results in damage to him. And a subsequent decision in the court of appeal is to the same effect: *Giblan v. National Amalgamated Union*, [1903] K. B. 600. These two cases are clear authorities for the present action. The latter case is quite in point. Giblan was a member of the union and was indebted to it in a considerable sum for

moneys that had been intrusted to him as treasurer of one of its branches. In order to compel him to pay this money the union, through two of its officers (whose acts were afterward approved by the union), undertook to prevent, and did prevent, plaintiff from getting or retaining employment, by calling out or threatening to call out the men. It was held that the union and its officers were liable in damages for interfering with Giblan in the exercise of his common-law right to dispose of his labor according to his will, and that their action was not justified by the fact that it was taken for the purpose of compelling him to make good his defalcation.

Upon both reason and authority, therefore, we are of the opinion that the acts of the defendants herein, as above recounted, amounted to an unwarranted interference with the plaintiff in his trade as a hatter, and he having sustained damage as a result thereof in losing his place of employment the present action is sustainable.

The judgment under review will be affirmed, with costs.

The Principal Case, in so far as it affirms the liability of members of labor unions and others for interfering with the employment or occasioning the discharge of another as the result of a combination, not founded upon actual malice, but for the purpose of compelling him to become a member of the union or to do some other act which he has a lawful right to refrain from doing, is supported by the weight of authority: *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, and cases cited in the cross-reference note thereto. Boycotting is the subject of a note to *Gray v. Building Trades' Council*, 103 Am. St. Rep. 488. Unlawful trusts and combinations are discussed in the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235. And the liability for inducing persons to break their contracts is discussed in the notes to *Raymond v. Yarrington*, 97 Am. St. Rep. 923; *Webber v. Barry*, 11 Am. St. Rep. 474.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

CLEMENT v. YOUNG-McSHEA AMUSEMENT COMPANY.

[70 N. J. Eq. 677, 67 Atl. 82.]

LANDLORD AND TENANT—Lease by Agent—Statute of Frauds.—A lease of land for more than three years, signed by an agent without written authority, has, as against his principal, no other effect than a lease at will, and is within the statute of frauds. (p. 749.)

CONTRACTS—Statute of Frauds.—A written contract between two persons concerning lands is, under the statute of frauds, not sufficient evidence of a contract between one of them and a third person not mentioned in the writing. (p. 750.)

CORPORATIONS—Power of Director to Bind.—A director in a corporation has no authority, merely as a director, to act for the corporation, except in his place as a member of the board of directors, although he owns a majority of the corporate stock. (p. 750.)

LANDLORD AND TENANT—Lease by Agent—Statute of Frauds.—One accepting a lease of lands from an agent for a longer period than that permitted by the statute of frauds is bound to ascertain whether he has the requisite written authority to execute the lease. (p. 751.)

LANDLORD AND TENANT—Lease by Agent—Effect on Principal—Want of Authority.—If an agent executes a lease beyond the scope of his authority, the principal is not deemed to have ratified it, nor to be estopped from repudiating it, unless he has had actual or constructive notice of its terms. (pp. 751, 752.)

LANDLORD AND TENANT—Lease by Agent—Effect on Principal—Ratification and Estoppel.—If an agent executes a lease beyond the scope of his authority, the knowledge of his principal that the tenant is in possession and paying rent is not sufficient, as against the latter, to work either a ratification or an estoppel. The principal has a right to presume that the tenant is in possession under the authority actually vested in his agent. (p. 752.)

LANDLORD AND TENANT—Lease by Agent—Effect on Principal—Ratification and Estoppel.—If an agent executes a lease beyond the scope of his authority, ratification or estoppel will not be inferred against his principal from knowledge that the tenant is

making trade improvements. The principal has the right to presume that his agent has acted within the scope of his authority in making the lease. (p. 753.)

AGENCY.—Knowledge of an Agent that he has overstepped the bounds of his authority cannot be imputed to his principal. (p. 753.)

AGENCY.—Knowledge Possessed by One Person cannot be ascribed to another, unless there exists between them a relation of agency, in the exercise of which such knowledge would be useful and pertinent. (p. 753.)

In the present case the Young-McShea Amusement Company was the owner of a building in Atlantic City, known as "Young's Hotel." For a long time, one Young, who owned a majority of the stock in such amusement company, had controlled its affairs, having unwritten authority to lease its property, and one Shackelford had been his manager and was also secretary of such company. Shortly before May 1, 1902, the respondent, Clement, agreed with Young to take a lease of a portion of the entrance of "Young's Hotel," and afterward Shackelford handed Clement a lease which is here set out so far as it is pertinent:

"This indenture, made the first day of May, A. D. nineteen hundred and two, between John L. Young, of Atlantic City, N. J., party of the first part, and M. J. Clement, of the same place, party of the second part, do grant, demise, and to farm let unto the said party of the second part, a certain space situate on the south side entrance to apartment house, seven feet front on boardwalk by forty feet deep (back to steps), also basement under entrance sixteen feet by forty feet, with the appurtenances, ten years from July 1, nineteen hundred and two, at the rent or sum of two thousand dollars, to be paid \$500 on May 1st; \$500 on July 1st; \$500 August 1st; and \$500 August 15th, of each year. . . .

"And the said party of the first part do covenant with the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

"In witness whereof, the said parties have interchangeably set their hands and seals hereto the day and year first above mentioned.

"JOHN L. YOUNG.

"W. E. S.

"M. J. CLEMENT."

When the lease was made, Clement knew that such company owned the "Young's Hotel," but did not know that the company was a corporation. On July 1, 1902, in pursuance with the provisions of the lease, Clement took possession of the premises, and fitted them up for his business at an expense of six thousand dollars, and he has since, up to the present, carried on business therein, having paid the rent to Shackelford, who collected it as Young's agent, and deposited it to his credit in the bank. Young has annually included such rent collected in his reports to the company on the state of accounts between himself and such company.

No director or officer of the company, except Young and Shackelford had any notice of the terms of the lease, but they all knew that Clement was occupying the premises as a tenant. In July, 1904, the company sued in ejectment against Clement, who then filed his bill to enjoin that action and to have the lease established as binding upon such company. The relief prayed for was granted and the company appealed.

Thompson & Cole, for the appellant.

H. Carrow and J. R. Wilson, for the respondents.

680 DIXON, J. The written instrument upon which the complainants base their claim was incapable of creating the term of years therein mentioned, either against the company or against Young, the lessor, because of the first section of the statute of frauds (2 Gen. Stats., p. 1602), which enacts that "All leases of any tenements made or created by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect except, nevertheless, all leases not exceeding the term of three years from the making thereof."

The lease was signed by Shackelford, who had only unwritten authority from Young, and no authority whatever from the 681 company. Consequently, as a lease, it had, both in law and equity, merely the force and effect of a lease at will. Even if it had been signed by Young himself, under his authority from the company, it would have had no greater force against the latter, because the authority was not conferred by writing. But the instrument contains, beside the implied cov-

enant for quiet enjoyment, presumed from the word "demise" (1 Washburn on Real Property, 325), an express covenant of like character, and it may be that such a covenant should be held to be covered by the fifth section of the statute of frauds as a contract concerning lands which an agent may lawfully sign without written authority. Assuming this to be so, the covenant would of itself be sufficient evidence of Young's contract, the authority of Shackelford to sign for him being unquestioned, but it would be inadequate against the company, under the decisions in this state, because it nowhere points out the company as one of the parties: *Schenck v. Spring Lake Beach Improvement Co.*, 47 N. J. Eq. 44, 19 Atl. 881; *Bowers v. Glucksman*, 68 N. J. L. 146, 52 Atl. 218.

But even if it be conceded that the complainants may discard the written instrument, except as indicating the terms of an oral contract made with Young, on the strength of which they entered into possession of the premises and made improvements thereon, then we are brought to these questions: 1. Had Young authority from the company to make the agreement? 2. Had the complainants a right to assume that he possessed such authority? 3. Is the company estopped from denying his authority? 4. Has the company ratified the agreement?

1. Merely as a director, Young had no authority to act for the company except in his place as a member of the board of directors: *Titus v. Cairo etc. R. R. Co.*, 37 N. J. L. 98; *Demarest v. Spiral Tube Co.*, 71 N. J. L. 14, 58 Atl. 161. Nor did the fact that he owned a large majority of the corporate stock enable him to bind the corporation: *Allemon v. Simmons*, 124 Ind. 199, 23 N. E. 768. The testimony clearly warrants the inference that his authority extended to the making of leases of the company's property, but it appears not to ⁶⁸² have been intended to embrace the making of leases or contracts for long terms. In one instance only, beside the present, did he give a lease for more than three years, and that was, as this is, in his own name as lessor and the company had no notice of its duration. On several occasions, when Young wanted to make leases for long terms two of the directors (the board consisting of three, or perhaps four) declared themselves not willing that he should do so.

We therefore conclude that his actual authority was not sufficient to support the agreement.

2. The complainant Thomas knew when he took the lease that Young was not the owner of the property, and although the lease was taken in the name of his wife, the evidence shows that the lease and the business carried on under it are the property of the husband. Moreover, both the complainants, in now contending for the enforcement against the company of a contract made with Young as its agent, must assume the responsibilities growing out of that contention, and must show that in dealing with him as agent they bound the company as principal. The transaction between Young as agent and the complainants was the delivery and acceptance of a lease for ten years, with the ancillary and incidental covenants. To render that transaction valid, either in law or equity, against Young's principal, his authority must have been in writing, and where a written authority is required by the very nature of the transaction, it is the duty of the persons dealing with the agent to make inquiries as to the nature and extent of the authority, and to examine it: Story on Agency, sec. 73. This, of course, implies that third parties have no right to assume the existence of such authority, when none is produced. It would be unreasonable to hold that an agent whose agency must, under a legislative rule of public policy, like the statute of frauds, be created by writing, might be dealt with as if such writing existed without any effort to ascertain its existence. Equally unreasonable would it be to hold that an agent appearing to have merely unwritten authority to make leases, which under such a rule cannot, either at law or in equity, bind his principal for more than three years, may yet make a contract incidental or ancillary to a ⁶⁸³ lease, which in equity will bind the principal for a longer period, in the discretion of the agent. These considerations prevent us from adjudging that the complainants had a right to assume that Young had the authority necessary to maintain their contract against the company.

3 and 4. The claims of estoppel and ratification are both barred by a single fact—that the company had no notice, either actual or constructive, that the complainants possessed or believed they possessed, a lease for a longer term than Young's unwritten authority entitled him to give, or that its own rights, consistent with the proper exercise of his authority, were in anywise infringed.

The necessity for such notice as the basis of either estoppel or ratification is clear: Ramsden v. Dyson, L. R. 1 E. & I.

App. 129; *Kirchner v. Miller*, 39 N. J. Eq. 355; *Sumner v. Seaton*, 47 N. J. Eq. 103, 19 Atl. 884; *Perkins v. Moorestown etc. Turnpike Co.*, 48 N. J. Eq. 499, 22 Atl. 180; *Central R. R. Co. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 175; *Story on Agency*, sec. 239; *Combs v. Scott*, 12 Allen, 493; *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728; *Titus v. Cairo etc. R. R. Co.*, 46 N. J. L. 393; *Annan v. Hill U. B. Co.*, 59 N. J. Eq. 414, 46 Atl. 563; *Dowden v. Cryder*, 55 N. J. L. 329, 26 Atl. 941.

It remains to consider whether the company is chargeable with notice that the complainants had, or believed they had, a lease for more than three years.

The company must undoubtedly be charged with notice that the complainants were in possession of the premises occupied by them, and were paying rent therefor to Young. But this was all consistent with the idea that they had become tenants under the authority actually vested in Young.

It should also be charged with notice of the improvements made by the complainants so far as those improvements were open to the observation of the public or of the company as possessor of the residue of the property, but it cannot be charged with notice of other improvements made upon the premises exclusively occupied by the complainants. The testimony does not indicate to what extent the complainants' improvements were ⁶⁸⁴ observable by the public or the company, and consequently we cannot say that the company was bound to infer therefrom that the complainants were acting upon a claim greater than the authority of Young could confer.

To this extent only was any notice given to the company or its officers or directors (outside of Young and Shackelford) and we deem it inadequate to impose upon the company the duty of inquiring whether Young had transgressed the limits of his power. Until such an inquiry became a duty the company was entitled to assume that its agent had acted rightfully, and its acquiescence would work neither ratification of his unauthorized act nor estoppel against repudiation of it.

Finally, it is urged that the knowledge of Young and of Shackelford should be imputed to the company.

Assuming that Young, in executing the lease, was attempting or appearing to act for the company, notwithstanding the form of the instrument, then, if his knowledge that he was overstepping the bounds of his authority is to be deemed notice thereof to his principal, no effective limitation can be imposed

upon the power of an agent. By the very act of transgressing the limits of his authority the agent would generally, for all practical purposes, enlarge them to the full extent of his transgression. Nothing short of immediate personal investigation on the part of the principal would in most instances protect his rights. An examination of the cases already cited will show that such a doctrine has no place in either legal or equitable jurisprudence.

The knowledge of Shackelford cannot be imputed to the company, because he was never authorized to act as its agent in any manner to which that knowledge was pertinent. His testimony is explicit and uncontradicted that in signing the lease and collecting the rent he acted solely on behalf of Young and had no authority whatever from the company. Although he was secretary of the company during the running of the lease and became a director in November, 1903, yet in neither capacity did any duty rest upon him concerning the complainant's tenancy. Whether the view stated in *Sooy v. State*, 41 N. J. L. 394, or that stated in *Willard v. Denise*, 50 N. J. Eq. 685 482, 35 Am. St. Rep. 788, 26 Atl. 29, be adopted, knowledge possessed by one person cannot be ascribed to another unless there exists between them a relation of agency, in the exercise of which the knowledge would be useful.

We find no ground on which, consistently with established rules, the decree below can be supported, and it must be reversed and the bill dismissed.

The Directors of a Corporation, as such, can act on behalf of the corporation only as a board. Their power is not joint and several, but joint only: *Buttrick v. Nashua etc. R. R. Co.*, 62 N. H. 413, 13 Am. St. Rep. 578.

Leases for More than One Year cannot be made except in writing; and if made by an agent, he must be authorized by writing: *Pusey v. Presbyterian Hospital*, 70 Neb. 353, 113 Am. St. Rep. 788. The effect of an oral lease for more than one year is discussed in the note to *Wallace v. Scoggins*, 17 Am. St. Rep. 752.

Persons Dealing with an Agent are, as a rule, bound to ascertain the scope of his authority; and if they do not, they deal with him at their peril: *Moore v. Skyles*, 33 Mont. 135, 114 Am. St. Rep. 801

McCARTER v. HUDSON COUNTY WATER COMPANY.

[70 N. J. Eq. 695, 65 Atl. 489.]

CONSTITUTIONAL LAW—Right to Acquire Property.—A constitutional right to acquire, possess and protect property does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law, nor the right of disposing of property that has not been duly acquired under the law of the land. (p. 759.)

CONSTITUTIONAL LAW—Privileges of Citizens.—A constitutional guaranty that the citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states does not guarantee to the citizens of another state, while resident there, all the privileges in a sister state that they would enjoy if resident therein. (p. 760.)

WATER AND WATERCOURSES—Right to Transport Water Beyond the State.—A corporation lawfully formed for the purpose of damming rivers and streams, and storing, transporting, and selling water, has no power under the statutes of New Jersey to deplete the streams of the state for the purpose of conveying the water beyond the borders of the state. (p. 760.)

CORPORATIONS—Repeal of Right or License.—If a corporate charter is by the express terms of the statute creating it repealable, no right or license that arises solely out of its terms, and that has not been acted upon, can be deemed to be beyond revocation by the legislature. (p. 765.)

WATER AND WATERCOURSES—Right to Divert for Sale. A riparian owner has no right, as such, to divert water from the stream to make merchandise of and sell it, nor has he any right to transport any portion of the water from the stream to a distance for the use of others than riparian owners. (p. 766.)

WATER AND WATERCOURSES—Right to Divert for Sale.—A riparian owner, as such, has no common-law right to make merchandise of the water that otherwise would naturally flow to the sea, and the state of New Jersey has not, by legislation or otherwise, departed from the common-law rule. (p. 770.)

WATER AND WATERCOURSES—Right to Divert for Sale—Public Use.—If any grant of the power of eminent domain is by the constitution limited to public uses, the withdrawal of water from a stream to make merchandise of it cannot be deemed a public use. (p. 771.)

WATER AND WATER RIGHTS—Commerce in Water—State Policy.—So far from sanctioning any general commerce in water and streams of the state, the legislative policy of New Jersey has been, and still is, to preserve and administer her water rights for the benefit of the people of the state to whom, by right of proximity and sovereignty, the waters naturally belong. (p. 773.)

WATER AND WATER RIGHTS.—One state or the citizens thereof have no inherent right to withdraw a supply of water from the territory of another state by artificial means. (p. 773.)

STATE RIGHTS.—One State cannot Expropriate for its public purposes property within the territory of another state. (p. 774.)

CONSTITUTIONAL LAW—Preservation of Water of State.—The state by statute may prohibit the abstraction from the lakes, ponds and streams of the state of waters to be used for any other purpose than to meet the lawful uses of riparian owners and vested rights under grants already made, and when a statute has forbidden its abstraction for a stated purpose, not within such uses, abstraction for that purpose becomes unlawful, and may be restrained at the suit of the attorney general. (p. 776.)

CONSTITUTIONAL LAW—Transportation of Water Out of the State.—A statute prohibiting any person or corporation from transporting, through pipes, conduits or other means, the waters of any fresh-water lake, pond or stream of the state into any other state is constitutional. (p. 776.)

WATER AND WATERCOURSES—Transportation Beyond State—Interstate Commerce.—A statute prohibiting the abstraction of water from the fresh-water streams of the state for transportation beyond its borders is not in violation of the interstate commerce clause of the national constitution. Water unlawfully diverted cannot legitimately enter into interstate commerce. (p. 776.)

WATER AND WATERCOURSES—Control of by State.—If the state owns the bed of the stream where flowed by the tide, save so far as it may have made grants to private owners, it has a proprietary right to the continued flow of the stream which is paramount to the rights of the upper riparian owners to withdraw water for purposes other than those incident to riparian ownership. (p. 776.)

CONSTITUTIONAL LAW—Control of Water in Streams.—The law-making power may determine whether the amount of water proposed to be abstracted from a stream for other than riparian uses is so slight that it ought to be disregarded, and it is also within the competency of the legislature to determine that the diversion shall be absolutely prohibited. (p. 777.)

R. V. Lindabury and Collins & Corbin, for the appellant.

R. H. McCarter, attorney general, for the state.

¶ PITNEY, J. The decree that is here under review awards an injunction to restrain the Hudson County Water Company from carrying or transporting any of the waters of the Passaic river into Staten Island, in the state of New York, or elsewhere, out of the state of New Jersey.

The cause was instituted in the court below by the filing of an information to which the defendant (now appellant) made answer, and was heard before the vice-chancellor upon these pleadings and upon the proofs and admissions of the parties concerning certain matters that did not clearly appear from the pleadings. It appears that the East Jersey Water Company, a corporation of this state, organized under the general corporation act of 1875, and its supplements and amendments (1 Gen. Stats., p. 907), has established extensive works at Little Falls, upon the Passaic river, a short distance above

the city of Paterson, and diverts water therefrom daily to the amount of thirty million gallons or more for the supply of certain municipal corporations and other consumers, and is engaged in the sale of water from the river to water companies and to municipal corporations. A system of water mains has been constructed, owned, in part, by the East Jersey Water Company, in part by another corporation of this state known as the New York and New Jersey Water Company, and in part by the present appellant, extending from the intake at Little Falls to and into the city of Bayonne, in Hudson county, which city lies upon the borders of the tidal waters of the Kill-von-kull, opposite to Staten Island. And that the Hudson County Water Company has entered into certain contracts, in pursuance of which it purposes to supply certain municipal corporations and other consumers upon Staten ~~ess~~ Island from the waters of the Passaic river, employing for this purpose extensions of its water mains that are to be constructed beneath the waters of the Kill-von-kull.

The information of the attorney general purports to be exhibited "on behalf of the state and at and by the relation of Henry B. Kummel, state geologist." The status of the state geologist as relator arises solely from a recent act of the legislature (Pamph. Laws 1905, p. 461), the constitutionality of which is the principal question in dispute. It is insisted by the appellant that if the act be unconstitutional, there is no other basis upon which the information can be sustained. The learned vice-chancellor, however, dealt with all the grounds upon which the prayer for injunction was rested, and we think the averments of the pleading are broad enough to warrant this course. Not only does the information purport to be exhibited on behalf of the state, as well as at the relation of the state geologist, but its averments include mention of many matters that would have been unnecessary had the statute alone been invoked, and the prayer is "that the Hudson County Water Company, pursuant to the provisions of the act entitled, etc., approved May 11th, 1905, and otherwise may be enjoined from carrying or transporting any of the waters of the Passaic river into Staten Island or elsewhere out of the State of New Jersey," with a further prayer for general relief.

The act in question (Pamph. Laws 1905, p. 461), reads as follows:

"AN ACT to preserve and maintain the lakes, ponds, brooks, creeks, rivers and streams of this state, and to prevent the

waters thereof from being carried by pipes, conduits, ditches, or canals into other states for use therein, and to authorize the court of chancery to assist in the observance of this act.

“WHEREAS, The available waters of the fresh-water lakes, ponds, brooks, creeks, rivers and streams of this state do not increase with the growth of population, and, unless the same are carefully preserved, will become inadequate to perform the functions they were by nature designed to do, which functions are essential to the health and prosperity of all the citizens of this state; therefore,

“BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

“1. It shall be unlawful for any person or corporation to transport or ~~con~~ carry through pipes, conduits, ditches or canals the waters of any fresh-water lake, pond, brook, creek, river or stream of this state into any other state for use therein.

“2. It shall be the duty of the state geologist to keep a general oversight over the fresh-water lakes, ponds, brooks, creeks, rivers and streams of this state, and to see that the same are preserved for the use and benefit of the citizens and inhabitants of this state, and to prevent the waters thereof from being carried or transported by pipes, conduits, ditches or canals into other states for use therein; upon its being brought to his knowledge that it is the intention of any person or corporation to so carry or transport into any other state for use therein, the waters of any such fresh-water pond, lake, brook, creek, river or stream of this state, it shall be his duty, through the attorney-general, to apply to the court of chancery for injunction to restrain the same, and the court of chancery is hereby authorized and empowered to entertain jurisdiction of a suit in equity to preserve the waters aforesaid for the use and benefit of the citizens and inhabitants of this state, and to prevent their being, by pipes, conduits, ditches or canals, carried or transported to other states for use therein; and to that end to issue such restraining order or injunction, both preliminary and final, as may be necessary, and to enforce the same in the same manner it is empowered to enforce other injunctions or orders.

“3. This act shall take effect immediately.

“Approved May 11th, 1905.”

In the printed brief for the appellant a point was raised which, although abandoned upon the oral argument, deserves mention. It is rested upon the alleged fact that the water in

question is not diverted from the Passaic river by the defendant, nor even by the New York and New Jersey Water Company, but by the East Jersey Water Company, it being insisted, first, that the latter two companies are necessary parties defendant, and secondly, that since the East Jersey company is permitted to divert the water for purposes of sale, the water diverted becomes an article of commerce, traffic in which between the state of New Jersey and the state of New York cannot be constitutionally prohibited by this state. The question of interstate commerce will be dealt with hereafter. With respect to the first suggestion, we do not consider the East Jersey Water Company and the New York and New Jersey Water Company, or either of them, necessary parties to this proceeding, whose object is to restrain the transportation of fresh water from the Passaic river by means of pipes and conduits to any ⁷⁰⁰ point or points outside of the state. The actual situation disclosed is this: That an intake exists at Little Falls, at which certain water mains are filled, and these mains extend continuously from that point to some point or points in the city of Bayonne at or near the state line. At their terminus in Bayonne the pipes are under the control of the present appellant, which may either open them or keep them closed, at its option, unless restrained by injunction. It purposes to continue these mains to and into Staten Island, and to use them there for furnishing water to divers large consumers. If this be permitted, the water that is thus dealt out by the appellant to consumers in Staten Island will flow in a continuous stream from the Passaic river at the Little Falls intake, and while for a part of the intervening distance this water will be indistinguishably commingled with waters that are destined for distribution to other consumers along the line of the mains, it is manifest that if the defendant desists from constructing or using its main to Staten Island, the outflow from the river at Little Falls will be diminished by the precise quantity that otherwise would go to Staten Island. In effect, the water that defendant proposes to supply to Staten Island would be diverted from the Passaic river by defendant. Without its intervention this water would continue to flow in the river. No injunction nor any other relief is needed against the two companies who are owners, respectively, of the intake and of the mains above Bayonne, and therefore these companies are not necessary parties to the present proceeding.

Coming, therefore, to the merits: It is important to keep it clearly in mind that if the defendant carries out the project that it has in contemplation a considerable part of the fresh and potable waters of the river Passaic will be diverted out of the river at Little Falls, and conducted thence in a continuous, artificial channel or channels to some point outside of the state of New Jersey, and will there be permitted (subject only to defendant's control) to escape and flow forth, to the benefit of citizens of the state of New York, and to the incidental profit of the defendant.

The questions are whether such an artificial and extra-territorial ⁷⁰¹ outlet can be prevented by the people of the state of New Jersey, with or without an act of the legislature, and if an act be needed for the purpose, whether the act of 1905 is a constitutional piece of legislation.

It must, we think, be sufficiently obvious that the government established in this state by and for the people thereof has complete dominion (subject only to constitutional limitations) over all things within the borders of the state, including all lands and waters, and the mode of acquiring and disposing of rights of property therein. The fresh-water lakes, ponds, brooks and rivers, and the waters flowing therein, constitute an important part of the natural advantages of this territory, upon the faith of which its population has multiplied in numbers and increased in material and moral welfare. The regulation of the use and disposal of such waters, therefore, if it be within the powers of the state, is among the most important objects of government. The act of legislation above quoted has for its avowed object the preservation of our fresh-water lakes, ponds, rivers and streams for the use and benefit of the citizens and inhabitants of this state. Aside from the immediate importance of the diversion in a given case, the act aims to prevent at the outset any extraterritorial diversion that, if permitted, might give rise to a claim of vested rights.

It is insisted the act in question is unconstitutional—first, as contravening the first section of the Bill of Rights contained in our state constitution, which declares that all men have certain natural and unalienable rights, among which are those of acquiring, possessing and protecting property, etc. In our view, however, this clause does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law, nor the right of

disposing of property that has not been duly acquired under the law of the land. It is argued that while the act does not prohibit the owner of water from selling it to another person or corporation within this state, it absolutely prohibits him from selling it to any person or corporation without the state, to be used without the state. The answer is that the act, properly construed in subordination to the constitution, does not prohibit the owner of water from selling ⁷⁰² it where he will; what it prohibits is the acquisition of ownership in flowing waters for the purpose of transporting them out of the state.

Secondly. It is objected that the act contravenes the fourteenth amendment of the constitution of the United States, which declares that no state shall deprive any person of life, liberty or property without due process of law. To this the like answer may be made.

Thirdly. The appellant cites article 4, section 2 of the federal constitution, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It may be a sufficient answer to this to say that the appellant is a citizen of this state, and cannot be heard to plead the privilege of a citizen of any other state. But, besides, it is clear that the statute does not discriminate between citizens of different states; its prohibition is aimed at all persons, whether citizens of this state or of any other state, who may presume to do the prohibited act. Certainly it is not within the intendment of the constitutional clause that citizens of the state of New York, while resident there, shall have all the privileges that they would enjoy if resident within our borders.

Fourthly. The principal constitutional argument is rested upon that clause of the federal constitution (article 1, section 8), which empowers Congress to regulate commerce among the several states. If the water whose transportation is prohibited, including the water of the Passaic river, of which the appellant seeks to make merchandise beyond our territorial borders, is the proper subject of interstate commerce, the state, of course, cannot interfere with the proposed traffic.

Such right as the appellant claims—to withdraw the water from the Passaic river and make merchandise of it—is derived by grant from the East Jersey Water Company. Whatever rights this company may have as against the state must

rest either upon its chartered powers, upon its status as a riparian owner upon the Passaic river, or upon both of these combined.

The charter of the East Jersey company has not been introduced in evidence. It appears to have been admitted upon the hearing below that in fact the company was incorporated under ⁷⁰³ "An act concerning corporations," approved April 7, 1875, and its supplements and amendments: 1 Gen. Stats.. p. 907, etc. Respecting the date of its incorporation the record is silent, but we must infer that it was prior to July 12, 1895, for a contract is in evidence made by the East Jersey company on that day. Concerning the powers of the company, we know nothing except that, in fact, it is engaged in the sale of water from the Passaic river to municipal corporations, and to water companies engaged in the supply of water to municipal corporations and other consumers within the state of New Jersey. We assume, therefore, that it possesses the amplest corporate powers in respect of the diversion and sale of water that could be acquired by any company organized under the general corporation act of 1875, and its supplements and amendments at any time prior to July 12, 1895.

Section 10 of the corporation act of 1875, as originally enacted (Rev. 1877, p. 179), made it lawful for any three or more persons to organize "a company to carry on any kind of manufacturing, mining, chemical, trading or agricultural business, the transportation of goods, merchandise or passengers upon land or water, inland navigation, the building of houses, vessels, wharves or docks or other mechanical business, the reclamation and improvement of submerged lands, the improvement and sale of lands, the making, purchasing and selling manufactured articles, and also of acquiring and disposing of rights to make and use the same, the renting of buildings and steam or other power therewith, the cutting and digging peat, stone, marl, clay or other like substances and dealing in the same, manufactured or unmanufactured, or any wholesale or retail mercantile business, or any lawful business or purpose whatever . . . ; provided, that nothing herein contained shall be construed to authorize the formation of any railroad company, turnpike company or any other company which shall need to possess the right of taking and condemning lands, nor of any insurance company, banking company, savings bank or other corporation intended to derive profit from the loan or use of money."

By Pamphlet Laws of 1876, page 103 (Rev. 1877, p. 1282, pl. 4), this section was amended by inserting among the authorized objects the following: "The damming of rivers and streams, including the storage, transportation and sale of water and water power and privileges, with the right to ⁷⁰⁴ take rivulets, raceways and lands and erect and maintain dams, reservoirs, raceways, mills, manufactories and other erections, and lease, mortgage, sell and convey the same or any part thereof"; and the proviso was amended by inserting in the clause that excluded companies which shall need to possess the right of taking and condemning lands the words: "Except for the damming of rivers and streams and for purposes pertaining thereto, as hereinbefore specified." A further proviso was added, as follows: "That this act shall not apply to any river or stream of a less width and volume of water than the Delaware river, ordinarily, at Phillipsburg, in this state, below its junction with the Lehigh, nor to any river or stream below the head of tidewater in the same."

The same supplement empowered companies established for the purpose of damming rivers and streams to construct, erect and maintain dams on rivers and streams of the width before mentioned not exceeding ten feet in height above low water, and to establish raceways and other works for the purpose of creating and using the water or water power for manufacturing purposes, provided the water so diverted should be returned again to the rivers and streams after being used. Powers of condemnation were likewise conferred, whether constitutionally or not is of no present consequence.

By supplement of March 3, 1880 (Pamph. Laws 1880, p. 92; Sup. Rev. 1886, p. 159, pl. 48), and by supplement of February 29, 1888 (Pamph. Laws 1888, p. 112; 1 Gen. Stats., p. 946, pl. 189), section 10 of the corporation act of 1875 was further amended, but not so as to enlarge the power of erecting and maintaining dams, etc.

Upon the whole, therefore, we may assume that the East Jersey Water Company is endowed with corporate power to dam rivers and streams, and to store, transport and sell water, subject to the limitations contained in the act just cited. But we cannot assume (understanding the fact to be otherwise) that the Passaic river at Little Falls is of a width and volume as great as those of the Delaware river at Phillipsburg.

It appears, by admission of parties made upon the hearing ⁷⁰⁵ below, that the defendant and appellant was incorporated

under and pursuant to "An act concerning corporations (Rev. 1896)": Pamph. Laws, p. 277. The sixth section of this act enumerates the objects for which corporations may be formed thereunder. The power of damming streams and storing and selling water as conferred by the supplements to the act of 1875 are eliminated from the act of 1896, and in a proviso to section 6 it is declared that nothing in this act shall authorize the formation of any insurance, safe deposit or trust company, banking corporation, savings bank or other corporation intended to derive profit from the loan and use of money, or of any railroad company (except companies formed for the purpose of constructing and operating railroads in other states and territories or in foreign countries), or any turnpike company, or other company, which shall need to possess the right to take and condemn lands. By section 118 (Pamph. Laws 1896, p. 317) the corporation act of 1875 and all acts amendatory thereof and supplementary thereto are repealed, with a saving of the corporate powers acquired and rights vested under the acts thus repealed.

By supplement of March 24, 1899 (Pamph. Laws 1899, p. 473), section 6 of the corporation act of 1896 was amended, but without including any authorization for the organization of companies for the purpose of diverting water from streams and storing and selling the water thus diverted.

Notwithstanding such water companies are not within the express prohibition of the proviso to section 6 of the act of 1896, either as originally enacted or as amended in 1899, it seems reasonably clear that it was not the legislative intent that the incorporation of such companies was to be permitted under those acts. The exclusion of the express authorization of such companies that resulted from the repealer of the act of 1875 and its supplements, and the express exclusion, in the act of 1896, of companies needing to possess the right to condemn lands in this state, are circumstances that point in this direction. The appellant's charter, therefore, confers no power to divert water from streams, and to sell the same, beyond the mere power to engage in "any lawful business."

⁷⁰⁶ If we were to assume, however, that the East Jersey Water Company, by obtaining a charter, under the general corporation act of 1875 and its supplements, for the purpose of damming streams and of storing and selling water within the purview of the amendments of that act, acquired not merely the corporate capacity to do those things, but the

consent of the state that they might be done to the depletion of the natural flow of the stream, so far as the state, either in its sovereign capacity or as riparian owner of the lands covered by the tidal flow of the stream at its outlet, had the power to grant such consent, and were to assume that the consent would apply to the Passaic river at Little Falls, still it seems to us that such consent could not, by any fair intendment, be deemed to authorize the depletion of our streams for the purpose of conveying water beyond the borders of this state. The act should be construed in view of the then existing circumstances, usages and practices. The transportation of water from this state to any other state was at that time unknown, save as it might be carried in bottles or other closed receptacles. It cannot be deemed that the legislature intended to confer upon any persons who desired to embark the necessary capital for the purpose the privilege of establishing an interstate aqueduct, and although the act authorizes the storage and sale of water, this, by reasonable interpretation, must be held to limit the distribution of water by pipes and aqueducts to such as is designed for the supply of the inhabitants of this state.

But could the license be deemed to have a broader scope, it was nevertheless revocable until acted upon. By the constitution of the state, as amended in 1875, article 4, section 7, placitum 11, corporate powers were required to be conferred by general laws, subject to repeal or alteration at the will of the legislature. And by the general corporation act of 1875 itself (which antedated the final adoption of the constitutional amendments), it is in section 6 provided (Rev. 1877, p. 178; 1 Gen. Stats., p. 911) that the charter of every corporation thereafter granted by or created under any act of the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature. As already pointed out, the repealer of the general corporation ⁷⁰⁷ act of 1875 that was embodied in section 118 of the revised corporation act of 1896 (Pamph. Laws 1896, p. 317), saved all the powers of existing corporations and preserved their vested rights. There is nothing to indicate that up to this time the East Jersey Water Company had entered into the business of transporting water outside of the state of New Jersey. Whether so or not, it is clear that the act of 1905, now under consideration, by its necessary effect, operated at least as a repealer of the corporate capacity to embark in any new enterprise of

that kind, even if such capacity was or could be gained by a charter under the general act of 1875. And since that charter was, by the express terms of the act, repealable, no right or license that arises solely out of its terms, and that has not been acted upon, can be deemed to be beyond revocation by the legislature: *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 Sup. Ct. Rep. 705, 40 L. ed. 838; *Galveston etc. Ry. Co. v. Texas*, 170 U. S. 226, 18 Sup. Ct. Rep. 603, 42 L. ed. 1017.

Upon the whole, therefore, it is clear that the alleged right of the appellant to transport waters outside of the state cannot be rested upon any chartered powers derived by the East Jersey Water Company under the general corporation act of 1875 and its supplements.

Is the case for the appellant bettered by the circumstance that the East Jersey Water Company is a riparian owner upon the Passaic river? Since that company owns the intake at Little Falls, we may assume that it is a riparian owner. But it is not claimed, and the case shows no ground for the claim, that as such owner it has any property right in the flow or water of the river other than such as pertains to any other riparian owner similarly circumstanced elsewhere in the state. If we assume that it has acquired the rights of all riparian owners from the intake to the tide, still, what are the nature and extent of those rights?

In the consideration of this question, as it bears upon the case before us, it is important to keep in mind that we are dealing now only with water as it stands or flows in lakes, ponds, rivers or other streams that have a natural outlet to the sea. Such water in its natural state (so far as respects private ownership thereof) is not personal, but real property, being as much a part ⁷⁰⁸ of the land itself as the soil and rocks. In this aspect it is viewed by the common law, which holds that he who owns the soil owns all above it and all beneath it. But in view of the transient and flowing nature of water, the land owner's property therein is not absolute, but qualified. In a sense he owns it while it is upon his land, but his ownership is limited to a usufructuary interest, without right to divert any from its natural course, saving for the limited uses that naturally and of necessity pertain to a riparian owner, such as the supply of his domestic needs, the watering of his cattle, the irrigation of his fields, the supplying of power to his mill, and the like. This right of user is limited

to so much as shall be reasonably necessary, and is qualified by the obligation to leave the stream otherwise undiminished in quantity and unimpaired in quality. The common law recognizes no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others.

By the common law of England the right of diversion appears to have been confined to lands of the riparian proprietor, extending a reasonable distance from the bed of the stream. In some of the states of the Union, where large portions of territory are arid and not capable of raising crops or sustaining a population without artificial irrigation, this rule has been much relaxed, but not so as to extend irrigation beyond the limits of the watershed that is naturally drained by the stream: *Chauvet v. Hill*, 93 Cal. 407, 28 Pac. 1066; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Southern California Investment Co. v. Wilshire*, 144 Cal. 68, 77 Pac. 767; *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971.

It will thus be seen that riparian owners, as such, have not any such right in or ownership of the waters that flow upon or past their lands as will entitle them to divert a portion of the flow and convey it elsewhere for the use of others than riparian owners. It is, indeed, often said that a riparian owner may grant to others the right to a portion of the flow, provided he do not infringe upon the rights of other riparian owners thereby. But, in strictness, no more is meant by this than that if such ⁷⁰⁰ grant be made, the grantor and his successors in title can no longer complain of such diversion: *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300; *Ormerod v. Todmorden Mill Co.*, L. R. 11 Q. B. Div. 155. See, also, *Doremus v. City of Paterson*, 65 N. J. Eq. 711, 55 Atl. 304.

If the East Jersey Water Company, as riparian owner, had that kind of ownership of the water itself which would give it the right to make merchandise of ten million gallons per day, it might, of course, do the same with the entire flow of the river. If one riparian owner had the right to do this, the like right must pertain to each other riparian owner, as well those above as those below the works at Little Falls, and this is, of course, a manifest absurdity. Nor can the riparian owner who first takes be given a better right than the others, without

establishing the rule of "prior appropriation." Such a rule was established by act of Congress of July 26, 1866, with respect to certain lands in the mining states of the west, for reasons explained in *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240. Any such rule is foreign to the common law, whose maxim is "*Aqua currit, et currere debet, ut currebat.*"

We are referred to the language of Mr. Justice Depue (afterward chief justice), speaking for the supreme court, in *Cobb v. Davenport*, 32 N. J. L. 369 (at page 378), where he said: "By the common law all waters are divided into public waters and private waters. In the former the proprietorship is in the sovereign; in the latter in the individual proprietor. The title of the sovereign being in trust for the benefit of the public, the use, which includes the right of fishing and of navigation, is common. The title of the individual, being personal in him, is exclusive—subject only to a servitude in the public for purposes of navigation if the waters are navigable in fact." Upon the strength of this it is contended by counsel for the appellant that it was intended to be held by the supreme court that the title of the individual riparian owner to the water itself—the fluid considered as a commodity—is exclusive against the public and against all persons except other riparian owners. An examination of the context, however, shows that nothing of the ⁷¹⁰ sort was intended. The question at issue was whether the land covered by Green pond, an inland lake having a navigable depth but no navigable outlet, and entirely remote from the flow of the tide, was in the plaintiff, who claimed title thereto under grants from the board of proprietors, or whether it was in the public, so that the plaintiff could not exclude the defendant from fishing upon the lake. What was meant by the language quoted is that in lands covered by private waters (and the case properly applied the tidal test as distinguishing public from private waters) exclusive title was originally in the boards of proprietors and could be conveyed by them to individuals.

That the interest of the riparian owner in the water is confined to the usufruct is clearly set forth in *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538.

Excluding, therefore, all the customary and lawful uses by means of which a riparian owner may properly diminish the flow of a stream, what private ownership remains in the residue? His right of ownership, manifestly, is the right

simply to have the flow continue—a valuable right, truly, but a right that partakes solely of the nature of realty, being, from the nature of things, inseparably annexed to the land itself.

We may concede, for the purposes of the present discussion, that a landholder may acquire an absolute private title to water, as water, by employing artificial means to intercept it as it falls in rain from the clouds, thus preventing it from reaching the natural streams: See dissenting opinion of Justice Field, in *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. ed. 173. We may concede, also, for present purposes, that subterranean waters, such as may be reached only by driving wells, when thus acquired, become absolutely the property of the proprietor of the soil, and may be dealt with by him as merchandise, and that if they be thus converted into a merchantable commodity the state would not be permitted to prohibit its transportation beyond the confines of the state. Water thus taken from wells may be placed on the same plane with oil and natural gas, concerning the latter of which it was held, by the supreme court of Indiana, in *State v. Indiana and Ohio Oil etc. Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579, ⁷¹¹ that the state could not constitutionally prohibit its transportation beyond the confines of the state.

The act of 1905 deals only with fresh water running in the natural streams and in lakes and ponds that have their outlets in natural streams. The decree under review, likewise, deals alone with water of this character. The common law recognizes no right of private ownership therein except to a limited extent by the riparian owners.

And since the exercise of all rights of private ownership by all riparian owners still leaves the stream to remain as a running stream, there remains a residuum of common or public ownership that under our system rests in the state as a trustee for all the people. Blackstone says: "Water is a movable, wandering thing, and must, of necessity, continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein": 2 Blackstone's Commentaries, 18.

And in *Cobb v. Davenport*, 32 N. J. L. 369 (at page 378), Justice Depue said: "The policy of the common law is to assign to everything capable of ownership a certain and determinate owner. . . . If capable of occupancy and susceptible

of private ownership and enjoyment, the common law makes it exclusively the subject of private ownership; but if such private ownership and enjoyment are inconsistent with the nature of the property, the title is in the sovereign, as trustee for the public, holding it for common use and benefit."

What the learned justice proceeded to say to the effect that in this state nontidal waters are private, not public, had reference, as already shown, to the right of fishing, and was not intended to assert a complete private ownership in the water as water.

Such private title as may be acquired in water, the liquid, when separated from its natural bed, may, for convenience, be described as a title by occupancy, and the question remains, How far does the law authorize the acquisition of such a title? As already shown, the common law authorizes its acquisition only by riparian owners, and for purposes narrowly limited. Beyond that the ownership is common and public.

⁷¹² The present case is closely parallel to *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. ed. 793, where the supreme court of the United States held that a state law prohibiting game killed within the state from being transported beyond its borders did no violence to the interstate commerce clause of the federal constitution, the decision being put upon the ground that by the common law wild game is subject to governmental control; that the state might exercise its control in such manner as to confine the use of it to the people of that state; that although the statute under consideration permitted the killing of game, and its sale within the state, yet the prohibition against exportation entered into every such transaction of sale, and rendered it strictly internal commerce; that the state in granting to its residents the right to kill game had lawful authority to impose a condition prohibiting its exportation, and that in the face of such a prohibition the game killed did not become the subject of interstate commerce.

Upon the argument here an attempt was made to distinguish this decision upon the ground that it turned upon the ownership of game by the state as successor to the king's prerogative. An examination of Justice White's opinion, however, shows that he based the king's prerogative and the state's right of control alike upon the fact that game was public property because not susceptible of absolute ownership by anybody.

Hence is derived the doctrine that control resides in the state, not as a proprietor, but in its sovereign capacity as representative and for the benefit of all the people in common. Water, the liquid, in its natural state, is as fugitive in character as game, and as little susceptible to private ownership.

And so the riparian owner, as such, has no common-law right to make merchandise of the water that otherwise would naturally flow to the sea.

But it is argued, in effect, that in this state we have by statute departed from the common law in this regard, and have authorized riparian owners and others to make general merchandise of the water of our lakes and streams. No doubt if such were the general policy of our statute laws, it would not be competent for ⁷¹³ the legislature to prohibit the exportation of such merchandise beyond the state. But no statute to this effect is cited, and we know of none.

From the organization of the state government until the constitutional amendments of 1875 which prohibited special laws for the purpose, many special charters were granted by the legislature conferring corporate powers that included the right to divert and use the waters of lakes, ponds and streams for purposes of power, for purposes of artificial navigation, and for the purpose of supplying cities and towns of the state with water for consumption. In most, although not in all, of these special charters there was no grant of the right to interfere with the natural course of the water other than such as may be implied from the grant of corporate powers that could not be exercised without the diversion of water from its natural courses and the expenditure of money by the corporators in the development of the various enterprises thus chartered. In a few cases the grants of water rights were more explicit, as witness the charter of the Society for the Establishment of Useful Manufactures, passed November 22, 1791 (Pamph. Laws 1791, p. 730, sec. 17); the act to develop and improve the water power of the Passaic river, approved March 30, 1868 (Pamph. Laws 1868, p. 545, sec. 1), which confers further powers upon the same society; the charter of the Morris Canal and Banking Company, passed December 31, 1824 (Pamph. Laws 1824, p. 158, secs. 5, 11); the charter of the Delaware and Raritan Canal Company, passed in 1830 (Pamph. Laws 1830, p. 75, sec. 11).

Shortly after the constitutional amendments of 1875, the legislature passed two general laws, one for the organization

of private corporations for the purpose of supplying municipalities with water (Pamph. Laws 1876, p. 318; Rev. 1877, p. 1365; 2 Gen. Stats., p. 2199), and the other authorizing cities to establish works of their own (Pamph. Laws 1876, p. 336; Rev. 1877, p. 720; 1 Gen. Stats., p. 646). Since then numerous other general acts have been passed looking to the supply of our various municipalities with water. Reference has already been made to the several supplements to the corporation act of 1875 that dealt with the damming of streams and the storage and sale of water. These supplements have been repealed: Pamph. Laws 1896, p. 317, sec. 118.

⁷¹⁴ Conceding all that may reasonably be claimed to be the effect of these various enactments, and others of like character, they do not evince any legislative policy to make the waters of our lakes and streams the subject of general merchandise, nor indeed of merchandise at all in any proper sense. The water that is diverted from a stream into an artificial canal for navigation does not become the subject of commerce. Water that is withdrawn for power purposes returns shortly to the natural bed. That which is withdrawn for the supply of municipalities shortly re-enters the common stock of the state. In a limited sense it may become for a time personal property, and to a limited extent be made the subject of barter and sale, but only for public purposes pertaining to the welfare of our own citizens, who, by the very fact of residence within our borders, have a prior claim upon such natural advantages as pertain to our territory. Any grant of the power of eminent domain is by the constitution limited to public uses, and the withdrawal of water from a stream in order to make general merchandise of it could hardly be deemed a public use. All our legislative grants (express or implied) of the right to divert water for other than the common-law riparian uses have been contained in corporate charters, general or special. The special charters are all, by fair intentment, confined to purposes that are of necessity limited to the territory of this state. The broadest charter for purposes of water diversion that could at any time be acquired under our general laws is such a one as we have above assumed to be possessed by the East Jersey Water Company. Its utmost scope and its limitations have already been indicated.

There is, in all of this legislation, no general purpose, much less any special enactment, that changes the rule of the common law so as to make the water of our streams and lakes

the subject matter of commerce in the ordinary sense. Nor was anything of this kind intended to be intimated in *New Jersey Suburban Water Co. v. Harrison*, 72 N. J. L. 194, 62 Atl. 767, where it was said: "There was evidence that the water in question had become a commodity, and had been bought and paid for by the water company." This water had been acquired from the ⁷¹⁵ East Jersey Water Company for the supply of one of the municipalities of this state. It was, at the most, converted into personal property for that limited purpose, but while in the distributing pipes was not the subject of commerce in the general sense.

It is suggested that where the legislature authorizes a municipality or a water company to sell and dispose of water to private consumers, the consumer may put the water into bottles or other receptacles and sell it abroad in the market. For present purposes this may be fully conceded, and we may assume (without conceding) that the state may not limit commerce in the bottled water to its own citizens. The statute under review imposes no such limitation, its prohibition being confined to the transportation of water without the state by means of pipes, canals, and the like. Whether the legislature, while authorizing the diversion of water from the streams for municipal purposes, might not at the same time entirely prohibit its being bottled for sale is quite a different question, concerning which no intimation is intended.

It is said that neither the act of May 11, 1905, nor the information of the attorney general seeks to prevent the diversion of water from the stream, but only its transportation into another state for use therein. A sufficient answer to this is that the legislature may well have confined its prohibition to that which required to be prohibited, and that the information of the attorney general is exhibited to prevent a specific infraction of the law, and need not concern itself with other matters.

Implicit in argument, however, is the suggestion that the absence of statutory prohibition against the diversion of river waters, saving where the water is intended for transportation out of the state, amounts to a legislative recognition of the right of riparian owners, and perhaps of others, to divert water from the streams at their will so long as it is disposed of within the state. To this argument we cannot yield our assent. The prohibition of artificial channels to lead our fresh waters out of the state does not at all imply license to divert

waters, provided they be used with the state. As we have just pointed ⁷¹⁶ out, it is, and long has been, the legislative policy of this state, while recognizing fully the common-law right of diversion on the part of riparian owners, to allow no statutory extension of this right, nor to authorize water diversion for other than riparian uses, saving for a limited class of purposes beneficial to the people of this state, such as the establishment of water powers for manufacturing purposes, the construction of artificial channels for navigation, and the supply of our own inhabitants with water through aqueducts.

So far from sanctioning any general commerce in water, our legislative policy has been and is to preserve and administer our water rights for the benefit of our own people, to whom, by right of proximity and sovereignty, they naturally belong. A recent instance is to be found in Pamphlet Laws of 1905, page 200, section 3, whereby the power of the flood commissioners to be appointed under Pamphlet Laws of 1904, page 518, is limited so that they shall have no power to sell or divert water beyond the state limits.

Throughout the whole of the argument for the appellant it is suggested, rather than distinctly urged, that the people of the neighboring state of New York have a natural right to the use of the waters of New Jersey if such use can be gained without impairing the rights of individual riparian owners upon our streams. It is said that the appellant purposes to take only the surplus water of the Passaic that is of no particular benefit to anyone while running in a natural state, and the impression is sought to be conveyed that the people of New Jersey have no right to interfere with what is called the natural right of the people of New York to gain a water supply from this source. Counsel indeed assails the act of 1905 as "a most unreasonable and unneighborly piece of legislation, highly discreditable to the state." Such epithets are of no service in a judicial tribunal. If the act under consideration be impolitic, arguments to that effect may well be addressed to the law-making body, but are out of place here.

Whether the proposed diversion of the appellant is material in quantity is a question that may receive consideration in its proper order. At this point we are concerned particularly in ⁷¹⁷ denying that the state of New York or the citizens thereof have any inherent right to withdraw a supply of water from the territory of New Jersey by artificial means.

In this respect the case of appellant can stand certainly on no higher ground than the people of New York themselves would occupy if in their sovereign capacity they were asserting similar rights in the courts. Stripped of all circumlocution, what is asserted is the right of the people of New York to derive an artificial water supply from the territory of New Jersey without the consent of the people of this state. This argument, however, is at once overthrown by reference to the established principle that one state cannot expropriate for its public purposes property within the territory of another state: *Randolph on Eminent Domain*, sec. 28, citing *Crosby v. Hanover*, 36 N. H. 404; *State v. Boston etc. R. R. Co.*, 25 Vt. 433; *Saunders v. Bluefield Waterworks etc. Co.*, 58 Fed. 133. See, also, 10 *Am. & Eng. Ency. of Law*, 2d ed., 1051; *Holyoke Water Power Co. v. Connecticut River Co.*, 52 Conn. 570.

To admit that the people of the state of New York have any inherent right to gain a water supply from the lakes or streams of New Jersey by means of an artificial aqueduct constructed for the purpose is to assert that the sovereignty of New York extends to some extent and for some purposes over the soil of New Jersey. To state the proposition is to refute it. Such interstate rights can be acquired only by interstate compact.

We have been privileged to see in print an opinion recently submitted to the Merchants' Association of New York by Mr. Randolph, author of the well-known work on *Eminent Domain*, upon the question of an interstate water supply for that city. Referring to "that interest in water which each state possesses as the guardian of its community," he says: "I think it is clear that the right of an individual or a corporation to divert water, whether gained by public grant or by prior appropriation, is presumed to be utilized within the state, which may forbid the carriage of the water beyond its bounds."

⁷¹⁸ Again, he uses this language: "And when we point out that each state holds all the property in its territory free from the eminent domain of another, and cannot be compelled to surrender its property to another in any way, I think we approximate the irreducible measure of sovereignty in this relation."

It will, of course, be observed that the case before us is not at all parallel to the case that would be presented were the state of New Jersey or citizens thereof setting up a right to interfere with a flow of water that otherwise would, in its

natural course, reach the territory of a neighboring state. Such a case was presented in *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. Rep. 592, 46 L. ed. 820. There the city of New York constructed a dam on the west branch of the Byram river, within the state of New York, this being a non-navigable stream of fresh water arising in New York, flowing thence through the state of Connecticut, and emptying into Long Island sound. The plaintiffs were riparian owners of land in the state of Connecticut, and brought action in the federal circuit court for an injunction to restrain the city from diverting the waters of the west branch from their natural flow through the plaintiff's lands. The supreme court assumed, without deciding, that although the west branch above the dam and all the sources of supply of water to that branch are within the limits of the state of New York, that state has no power to appropriate such water or prevent its natural flow through its customary channel into the state of Connecticut. The injunction was denied, however, and the right of the plaintiffs to pecuniary compensation established in its stead, on the ground of their acquiescence in the construction of the works by means of which the diversion was to be effected. In the great case of *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. Rep. 552, 46 L. ed. 838 (decided on demurrer, but not yet determined on final hearing), the state of Kansas, partly on the basis of its ownership of riparian lands upon the Arkansas river, and partly in the right of its citizens who are riparian owners thereon, is seeking to enjoin the state of Colorado from withdrawing from the river for irrigation of the arid lands of Colorado so much of the waters of the river as to materially injure the riparian lands in ⁷¹⁹ Kansas. A demurrer to the bill was overruled on the ground that in a case of so great importance a determination of the questions involved ought to be left until the facts were established by proofs. Impliedly, the right to prevent an undue interference with the natural flow of the river was recognized.

But whatever recognition these two important decisions imply of the right of one state to prevent another state from interfering with the natural flow of a river in which the complaining state has an interest is directly opposed to the contention of the appellant here, for what it is asserting, in effect, is the right of citizens of the state of New York to interfere with the natural flow of one of the rivers of New Jersey, with-

out the consent and contrary to the express prohibition of the people of the latter state.

In our opinion, therefore, the legislature may prohibit the abstraction from the lakes, ponds and streams of the state of waters to be used from any other purpose than to meet the lawful uses of riparian owners (saving, of course, other rights vested under grants already made), and when the legislature has forbidden its abstraction for a stated purpose not within such uses, abstraction for that purpose becomes unlawful, and may be restrained at the instance of the attorney general.

The act of 1905 forbids its abstraction by canals or conduits for transportation beyond the state. This is not in violation of the interstate commerce clause of the federal constitution, because until the water is lawfully abstracted it does not become the subject of legitimate commerce: *Ames v. Kirby*, 71 N. J. L. 442, 59 Atl. 558. The state having power to prohibit the diversion of the water from the lakes and streams for transportation beyond the state, the prohibition is a condition imposed upon its diversion, and so the water diverted cannot legitimately enter into interstate commerce: *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. ed. 793.

The act of 1905 is thus vindicated as a legitimate exercise of the sovereignty of this state, not interfering with private property rights, with the rights of citizens of other states, nor with interstate commerce.

⁷²⁰ It must not be forgotten, however, that the state of New Jersey is itself a riparian owner upon the Passaic river below the intake of the East Jersey Water Company. The state owns the bed of the stream where flowed by the tide, saving so far as it may have made grants to private owners. The state, therefore, has a proprietary right to the continued flow of the stream which is paramount to the rights of the upper riparian owners to withdraw water for purposes other than those incident to riparian ownership. For this additional reason the state, in its sovereign capacity, may prohibit any extraordinary diversion, such as would be occasioned by withdrawing water from the river by means of artificial canals or pipes for the purpose of conducting it out of the state.

It is no answer to say that the abstraction of the entire flow of the Passaic would not lower the level of the water that covers the state's land, which, as asserted, is governed by the level of the sea. The assertion is not accurate, for, of course, the downward flow of the river combines with the flow of the

tide to determine the water level at the mouth of the river, and for a long distance above its mouth. But aside from this question, the state, as riparian owner, is interested in the quality of the water that flows upon its land.

In the face of an express statutory prohibition, resort cannot be had to the maxim *de minimis*. It is for the law-making power to determine whether the amount of water proposed to be abstracted is so slight that it ought to be disregarded, and it is within the competency of the legislature to determine, as they have done in this act, that the diversion shall be absolutely prohibited. A similar question was presented in *State Board of Health v. Diamond Mills Paper Co.*, 63 N. J. Eq. 111, 51 Atl. 1019; affirmed, 64 N. J. Eq. 793, 53 Atl. 1125. There a statute prohibited the discharge of polluting material into any stream from which municipalities receive a water supply for domestic uses above their point of intake, and authorized the state board of health to institute an action in the court of chancery to enjoin the continuance of such pollution. It was contended that the pollution proved did not affect the water of the stream beyond a short distance ⁷²¹ from the point of pollution, and the proofs did not show that the water supply of any municipality was in fact polluted. But Vice-Chancellor Stevens held, in effect, that in the face of the legislation the amount of pollution was immaterial. His decision was affirmed by this court for the reasons given by him.

We must not be understood, however, as intimating that the mischief at which the act of 1905 is aimed is trifling or unsubstantial, nor that the diversion proposed by the appellant is of no present practical moment. The amount proposed to be presently diverted is a material part of the dry weather flow of the Passaic at Little Falls. Comparisons between this amount and the volume of the river in times of flood are not of the slightest value. Nor can it be properly said that when the river runs unobstructed to the sea, its water, either in time of drought or in time of flood, is "wasted" in any general sense. It carries off polluting material (see the practical situation disclosed in *Simmons v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995, 48 L. R. A. 717, and *Van Cleve v. Passaic Valley Sewerage Commrs.*, 71 N. J. L. 183, 58 Atl. 751), it fructifies the soil, and performs the other normal functions of a fresh-water stream. The withdrawal of three million to ten million gallons per day is not a matter that may be treated as of little consequence. If the decree under re-

view were to be justified only by resort to the police power, and if it interfered with any property rights of the appellant, it might be necessary to show a substantial present necessity for such interference. Such, however, is not the case.

The act of 1905 looks not only to the present, but to the future. It recognizes that the growth and prosperity of the state depend not alone upon the advantages that it presently affords, but upon the assurance that the like advantages, to the extent of our natural resources, properly conserved, will remain for posterity. This policy of foresight, and the desire to foreclose in advance any claim of a vested right to transport the waters of our lakes and streams beyond the borders of the state, doubtless entered into the motive of the legislature in imposing a present prohibition.

We find it unnecessary to discuss the grounds upon which the ⁷²² learned vice-chancellor based his conclusions, aside from the act of 1905.

The decree under review should be affirmed with costs.

Waters, Diverting to Another State.—The Right to Divert the Water of a Stream to be used on land beyond the watershed is discussed in *Bathgate v. Irvine*, 126 Cal. 135, 79 Am. St. Rep. 158; *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634; *Watkins Land Co. v. Clements*, 98 Tex. 578, 107 Am. St. Rep. 653. Where a stream flows from one state into another, water may be appropriated and diverted in the former state for use on land in the latter: *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939.

BRADY v. CARTERET REALTY COMPANY.

[70 N. J. Eq. 748, 64 Atl. 1078.]

CONSTITUTIONAL LAW—Quieting Title—Jury Trial.—Under a statute providing that a person in possession may bring and maintain a suit in chancery to settle the title to land, and that “upon the application of either party an issue of law shall be directed to try the validity of such claim, or to settle the facts, and the court of chancery shall be bound by the result of such issue, but may for sufficient reasons order a new trial thereof, according to the practice in such cases,” the intention of the legislature was that an issue at law should be awarded, and not an action at law directed, and that the suit should be purely equitable, the defendant therein not being entitled as a constitutional right to a trial by jury in an action at law, as distinguished from a trial of the issue at law as directed by the court of chancery. (p. 779.)

APPEAL AND ERROR—Appealable Orders.—The refusal of the chancellor to grant a new trial of an issue at law as directed by him in a suit to quiet the title to land is an appealable order. (p. 786.)

E. Cuteer and W. P. Voorhees, for the appellant.

Collins & Corbin, for the respondent.

748 REED, J. Michael Brady, the appellant, filed a bill against the realty company to have his, complainant's, title determined. The bill sets out the complainant's peaceable possession of the land in question, and sets out that the Carteret Realty Company claims to own the land, and that no suit was pending to enforce or test the validity of such claim.

After issue joined in this suit the chancellor made an order for the framing of an issue in the supreme court, to be tried in the ordinary manner, between the Carteret Realty Company, **749** as plaintiff, and Brady, as defendant, to determine whether the realty company was entitled to the possession of the tract as against Brady.

The issue so framed was tried and a verdict returned for the realty company. This verdict was certified to the chancellor by the trial justice, with the opinion of the latter magistrate that the verdict was warranted by the evidence. Brady then moved for a new trial, which motion was heard and afterward denied by the chancellor. From the order of the chancellor denying this new trial, this appeal is taken.

Two preliminary questions precede the discussion of the action of the court of chancery in refusing a new trial. These questions involve the right of the court of chancery to deal with the verdict at all, for the query is whether the function exercised by the chancellor is not one which belongs alone to the supreme court. The solution of these questions requires an examination of the legislation under which this proceeding was taken.

This suit was brought under the provisions of "An act to compel the determination of claims to real estate in certain cases and to quiet the title to same": 3 Gen. Stats., p. 3486.

The first section of this act provides that "When any person is in possession of lands in this state, claiming to own the same, and his title thereto or to any part thereof is denied or disputed, or any other person claims, or is claimed to own the same or any part thereof or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle

the title of said lands, and to clear up all doubts and dispute concerning same."

The fifth section of the statute provides that "upon the application of either party an issue at law shall be directed to try the validity of such claim or to settle the facts, or any specified portion of facts upon which the same depends; and the court of chancery shall be bound by the result of such issue, but may, for sufficient reasons, order a new trial thereof, according to the practice in such cases."

⁷⁵⁰ The remaining portion of the section provides, in substance, that when the issue is not applied for the court shall proceed to determine such claim according to the practice of that court.

The first question involves an ascertainment of the intent of the legislature in declaring, in the fifth section, that the "court of chancery shall be bound by the result of such verdict"—whether it meant that the verdict, when returned by the jury, should constitute the "result of such issue," or whether it intended that there should be a judgment entered upon the verdict in the supreme court.

The legislative intent seems to be clear that the words "issue at law" mean such an issue as has been always known and employed in the administration of equity jurisprudence. The only additional force to be given to the verdict in this statutory suit is that, so long as it is permitted to stand, the court of chancery is bound by it. It is clear that the trial judge's certificate is to be sent to the chancellor, for, by the terms of the act, he, for sufficient reasons, may grant a new trial, according to the practice in such cases. It would be absurd to suppose that it was the intention of the legislature, in the face of this express power lodged in the court of chancery, that the supreme court should also have the power to review the finding of the jury upon a rule to show cause, or the validity of a judgment entered upon it by a writ of error.

What the legislature intended was that an issue at law should be awarded, and not an action at law directed. In the former the verdict is reported at the court of chancery; in the latter the *postea* goes to the supreme court. The distinction between the two and the practice attending each is well defined: *Trenton Banking Co. v. Rossell*, 2 N. J. Eq. 492; *American Dock and Improvement Co. v. Trustees for the Support of Public Schools*, 37 N. J. Eq. 266.

The answer to the first question is that the statute means, by the use of the words "result of such verdict," the verdict as returned by the jury and certified to by the chancellor.

The second question is whether, in view of the constitutional division of judicial powers between the court of chancery and the law courts, the legislature can authorize the chancellor to ⁷⁵¹ set aside or disregard the result of the issue in such case, when there are no equitable considerations involved.

It is, of course, apparent that if the action involves a question which belongs alone to the law courts, it follows that the statute strips the supreme court of a prerogative insured to it by the constitution of 1844, by its language that the several courts of law and equity, except as otherwise provided, shall continue with like powers and jurisdiction as if the constitution had not been adopted.

It cannot be doubted that it is entirely settled in this state that it is beyond the competency of the legislature to confer a purely legal faculty upon the court of chancery or a purely equitable faculty on a court of common law: *Jersey City v. Lembeck*, 31 N. J. Eq. 255.

So it cannot be doubted that if the question involved in this suit is one purely legal, then the legislature has deprived the supreme court of its constitutional right—or, rather, deprived the citizen of his right to try an issue of this kind in that court—for, although the statute preserves the right of trial by jury, yet so long as the trial and its results are under the exclusive supervision of the court of chancery, it is not a trial by law under the rightful control of the supreme court.

The doctrine which underlies the present litigation is as ancient as equity itself. It is a doctrine upon which all suits *quia timet*, including suits to remove clouds from the title of persons in possession, rest. The doctrine is that where there is none, or an adequate remedy at law for any wrong, equity will furnish a remedy.

The wrong in this class of cases is that there is outstanding an illegal but colorable claim against the complainant, which vexes and harasses him, destroys his credit or depreciates his property. This claim may become the more dangerous by the passage of time, by reason of the loss of testimony, and by the fact that the claim is permitted to remain unchallenged. If the complainant is seemingly or actually the maker of a

note, bond, mortgage or deed, which is in fact a nullity, the law provides him no way to bring the matter to a judicial test. So, if he is in possession of land, the title to which is menaced by an outstanding ⁷⁵² claim, mortgage, judgment or deed, which is in fact invalid, he is placed at the same disadvantage at law.

Judge Story sums up the equitable doctrine in these words: "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose to the injury of a third person. If it is a deed, purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title. If it is a mere written agreement, solemn or otherwise, still while it exists, it is always liable to be applied to improper purposes; and it may be vexatiously litigated at a distance of time when the proper evidence to repel the claim may have been lost or obscured; or when the other may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment": 1 Story's Equity Jurisprudence, sec. 700.

Mr. Pomeroy remarks: "If the legal remedies administered by the judicial machinery and methods adopted in law courts are fully adequate to establish, protect and enforce the party's legal estates, interests and rights, a court of equity will not interfere in his behalf with the purely remedial branch of its exclusive jurisdiction; if the legal remedies, either from their own essential nature, or from the imperfection of the legal procedure, are inadequate, then the court of equity will interpose": Pomeroy's Equity Jurisprudence, sec. 220.

The writer illustrates by reference to the cancellation of instruments, because in such a case, if the present unlawful holder of the instrument—although legal defense in an action by him would be perfect—should transfer the security to a bona fide purchaser, the complainant would be without an adequate legal remedy.

It hardly needs a citation from these recognized authorities to recall the well-known doctrine that in suits of this class jurisdiction rests upon the nonexistence of an adequate legal remedy by which the rights of the complainant may be properly asserted and protected. Thus, by reason of the ina-

bility of a complainant to bring the validity of a note, deed or other instrument to a test in an action at law, a question, otherwise purely legal, becomes cognizable in a court of equity.

⁷⁵³ The principle is illustrated by the result in the case of *Jersey City v. Lembeck*, 31 N. J. Eq. 255, where a bill to remove and set aside municipal assessments was dismissed because there was a complete remedy by certiorari. In *Shepard v. Nixon*, 43 N. J. Eq. 627, 13 Atl. 617, the bill was dismissed, as a suit under the statute now under consideration, because there was no actual possession by the complainant, and dismissed as a bill quia timet, irrespective of the statute, because there was a remedy at law by an action of ejectment.

Bills of peace rest upon the same principle, namely, the inadequacy of an action at law to finally determine title. Indeed, as pointed out by Mr. Spence (*Spence's Equity Jurisprudence*, p. 691), originally the court of equity did not scruple to entertain bills concerning legal rights, although there was a remedy at law. The exercise of this jurisdiction was later discontinued. It is true that, as a general rule, a court of equity will not entertain a bill of peace to quiet title until a right of possession has been established in a court of law.

This, however, seems not to have been an infallible rule, for it was held in *York v. Pilkington*, 1 Atk. 282, that when a man had been in possession of a fishery for a long time, he might exhibit a bill to quiet his possession, although he had not established his title.

What the present statute does is to extend the scope of equitable relief by abolishing the necessity of a previous trial at law in cases where the complainant is so placed that he cannot bring such an action. In the present case there was no way by which the complainant could institute a proceeding at law to test the relative rights of the parties to the locus in quo, nor any way in law by which he could compel the defendant to do so.

Assuming that the courts of equity would not formerly have granted relief in this specific instance, it is not perceivable how the statute, which merely extends the operation of a well-settled equitable maxim, creates a proceeding which is other than what the statute describes it, namely, an equitable suit; nor is it perceptible in what way the statute strips the courts of law of any of their constitutional functions.

Mr. Justice Field, in delivering the opinion in *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495, 28 L. ed. 52, a case which involves the enforcement of a Nebraska statute to quiet title, observed: "The truth is that the jurisdiction to relieve holders of real property from vexatious claims to it, casting a cloud upon their title and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity; and though conditions for its exercise have at different times been prescribed by that court, both in England and this country, they may at any time be changed or dispensed with by the legislature without impairing the general authority of the court." Again, he observes: "It does not follow that by allowing, in the federal courts, a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy in a court of law respecting the title or right of possession to real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against the party in possession. Should suit be brought in a federal court under the Nebraska statute against the party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law."

The views thus expressed by Mr. Justice Field were reviewed and reiterated by him in the subsequent case of *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. Rep. 276, 34 L. ed. 873. In the last case the federal supreme court held that no relief could be afforded under the provisions of an Iowa statute to quiet titles, because in the case then before the court there was an adequate remedy at law.

For the reasons expressed, we are of the opinion that an action provided by our statute is a purely equitable suit, to be conducted according to the practice in our court of chancery.

In respect to the right of trial by jury, it is entirely settled that the right to a jury trial preserved by the constitution does not apply to courts of equity, which, as Chief Justice Kinsey remarks, in the case of *Wood v. Potter*, 1 N. J. L. 153, could always proceed without the intervention of a jury. What the chief justice meant was that a court of equity always had the right to so proceed: 3 Am. & Eng. Ency. of Law, 1st ed., 722.

⁷⁵⁵ It is true that the courts of equity often send to a jury the determination of perplexing questions of fact, particularly where a question of title of property becomes involved in the administration of some equitable relief. This practice, however, is the creature of the equitable judges. If, however, it should be conceded that at the time of the adoption of our constitution the practice to submit to a jury a particular class of questions—as, for instance, the question of title to real estate—had become so inveterate that it could be said that a trial at law had become a right, nevertheless, that fact would not invalidate the provisions of this statute, for it cannot be pretended that there was any practice in the equity courts of England or of this state which conferred the right to a trial by jury in an action at law. The practice was either to direct the trial of an issue or to direct an action at law.

In the old case of *Pomfert v. Smith*, 4 Bro. P. C. 700, it was said that courts of equity had adopted the practice, when they saw that the dispute was a mere question of law, of either directing an issue or giving the parties leave, within a limited time, to bring an action at law.

The instances of a trial of legal questions by a jury by means of an issue at law instead of an action at law are numerous. It was the practice adopted in a suit to settle the boundaries between two manors (*Lethieullier v. Castlemain*, Dick. 46); to try the question whether defendant or plaintiff was heir at law (*Newton v. Newton*, Dick. 443); to determine in whom the right to have a legal estate was vested (*Burkett v. Randall*, 3 Meriv. 466).

Such an issue was directed where the crown sought to recover lands alleged to have been reclaimed from the sea and the defendants disputed title to lands between the then present high and low water mark (*Attorney General v. Chamberlaine*, 4 Kay & J. 292), and where a man set up an exclusive right and those who disputed it were numerous: *Tenham v. Herbert*, 2 Atk. 483.

The practice in this state is exhibited by the cases collected in *Stewart's Digest*, page 448, under the equity head of "Issue at Law."

⁷⁵⁶ Inasmuch as the act to quiet title now under discussion confers upon the defendant the privilege of demanding such an issue, his right to a jury trial—conceding that such

right exists—is secure. The conclusion is that the statute is in all respects constitutional, and the chancellor, in directing an issue and in reviewing the verdict returned by the jury, was acting within the jurisdiction with which his court is invested.

It is insisted by the respondent that the order of the chancellor refusing a new trial is not an appealable order. We think it is. Such an order was reviewed by the house of lords in *McGregor v. Topham*, 3 H. L. Cas. 132, and also in *Boyse v. Rossborough*, 6 H. L. Cas. 1.

It was held by this court, in *Newark etc. R. Co. v. Newark*, 23 N. J. Eq. 515, that an order for an issue was appealable.

The opinion expressed by Judge Whelpey, in *Black v. Shreve*, 13 N. J. Eq. 455, to the effect that the action of the chancellor respecting an issue and upon the finding of a jury therein was not appealable, was based entirely upon the existence of a discretion in the equity court to regard or disregard the verdict, and upon the fact that the whole object of the issue was to inform the conscience of the court. But under our act to quiet titles an issue must be allowed, and when the verdict is returned it is a final determination of the question submitted, so long as the verdict is permitted to stand. The order refusing to set such a verdict aside is clearly appealable.

In exercising our right to review the grounds upon which the chancellor refused a new trial, it is sufficient to say that our examination has led us to concur in the views expressed by the chancellor in the opinion delivered in the court of chancery, and for the reasons therein given the order is affirmed.

A Jury Trial cannot, as a rule, be demanded as a matter of constitutional right in equity cases: *Hathorne v. Panama Park Co.*, 44 Fla. 194, 103 Am. St. Rep. 138; *Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256; *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145; *Lynch v. Metropolitan etc. Ry. Co.*, 129 N. Y. 274, 26 Am. St. Rep. 523.

In an Action to Quiet Title, either party is entitled to a jury trial under the constitution of California: *Donahue v. Meister*, 88 Cal. 121, 22 Am. St. Rep. 283.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

BARRETT v. BREWER.
[143 N. C. 88, 55 S. E. 414.]

ADVERSE POSSESSION—Parent and Child.—If a child holding a deed to a tract of land dies without having entered into possession, and thereafter her father, living on a different tract, takes possession and holds it until his death, when other of his children enter into possession, it will not be presumed that the father entered into possession in behalf of such other children, without evidence that he professed to do so, nor that they had any title, or at most only color of title, and his possession will not inure to them and perfect any colorable title they may have had as against a stranger holding a deed to the land. (p. 789.)

APPEAL AND ERROR.—A defendant is not bound to except to an instruction which there is no evidence to warrant, and he has already moved to dismiss the action. (p. 791.)

W. L. Spencer, for the plaintiff.

J. A. Spence and R. T. Poole, for the defendant.

⁸⁸ WALKER, J. The plaintiffs brought this action to recover possession of a tract of land and damages for withholding the same. They introduced a deed from Alexander McQueen to George Bryant, dated February 8, 1862, and a deed from George Bryant to Josephine Barrett, dated February 5, 1870. These deeds covered the land in dispute. Plaintiffs then proved that Josephine Barrett, who was their sister, was born in 1864 and died in 1872, without ever having entered upon the land, and that the plaintiff, R. A. Barrett, was born in 1866, J. D. Barrett in 1872, Charlotte McArthur in 1873 or 1874, Ruhamah McNeill in 1876, and Mary L. Barrett in 1887 or 1888, and it appears that Maud M. Barrett and R. G. Barrett are now minors and appear in this action by their next friend, ⁸⁹ U. L. Barrett. All of said plaintiffs are the children of Robert W. Barrett, and

lived with their father at his home on another tract of land, until his death, which occurred in the year 1897. Evidence was then introduced by the plaintiffs tending to show that their father took possession of the land in controversy in 1881 or 1882 and cut timber on it or worked the trees for turpentine by himself or his tenants until his death in 1897, when the plaintiff R. A. Barrett entered into possession for himself and his coplaintiffs and had timber cut on the land. That there was no part of the land cleared prior to 1897, when R. W. Barrett died. The defendants introduced a grant from the state to the defendant Frank Brewer and H. A. Johnson, dated October 15, 1891, and a deed from the grantee, H. A. Johnson, to C. A. Brewer, who was one of the defendants, and they claimed title under the grant and deed which covered the land. They also introduced evidence tending to show that R. W. Barrett and the plaintiffs after him did not, as the plaintiffs alleged and attempted to prove, have adverse possession of the land, but that they, and those claiming under and for them, had been in the adverse possession of it since the grant was issued in 1891, and had cleared and cultivated a part of it and worked the trees for turpentine. That they ousted Martin Black, the tenant of Robert W. Barrett.

The defendants' counsel moved, at the close of the plaintiff's testimony and again at the close of all the testimony, to dismiss the action under the statute. Their motion was overruled and they excepted. Defendants' counsel also requested the court to charge, among other things, that if the jury believed the evidence they should find that the land belonged to Frank Brewer and H. A. Johnson in October, 1891. This instruction was refused, and they again excepted.

The court charged the jury as to what was required in this state to constitute title to land and explained to the jury what ⁹⁰ is meant by adverse possession, and further explained, as the case states, "the force and bearing of Robert W. Barrett taking possession for his children," to which there was no exception. It does not appear, though, what his honor said in this connection. The court further instructed the jury that the possession of Robert W. Barrett prior to the date of the state grant, October 15, 1891, could not be considered, but only the possession of the plaintiffs, if they had any, since that time; and then told the jury if they found that the

plaintiffs had been in adverse possession of the land under color of title from October 15, 1891, to the spring of the year 1899, they should answer the first issue, as to the ownership and right to the possession of the land, "Yes." The usual issues in ejectment were submitted. There was a verdict for the plaintiffs, and the defendants moved for a new trial upon exceptions taken to the several rulings of the court as to evidence, the refusal to give instructions and the instructions given, and also to the refusal to nonsuit the plaintiffs. The motion was denied and judgment entered upon the verdict; whereupon the defendants excepted and appealed.

It was conceded that if the plaintiffs' counsel cannot avail themselves of their father's possession of the land, they cannot recover. The argument before us in this case indicated that the court had charged the jury to presume that Robert W. Barrett went into possession of the land and held it for his minor children, because during the time of his occupancy they lived together as members of the same family, and as he was their father and therefore was under the duty and obligation to look after all their affairs, and as they had color of title. We do not think this proposition can be sustained, and after diligent ⁹¹ search we have not been able to find any authority sustaining it; and yet it must be upheld in order to affirm the judgment, as there is no evidence that the father actually took possession of the land for his children. Indeed, the testimony tends to show that he was acting for himself. In *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201, we stated, incidentally though not decisively, the general rule to be that, as between persons occupying parental or filial relations, the possession of one is presumed to be permissive and not adverse to the other who holds the title. But in that case the parties were living together as one family on the same tract of land, it being the locus in quo, while here the plaintiffs did not live with their father on the land in dispute, but on a different tract and, as stated in the argument, in another county. It may also be said that in that case the controversy was one between the father and his children, and the question presented was whether the father's possession was adverse to the children so as to have the effect of barring their right by the lapse of time, while here the dispute is between the children and a stranger, the former claiming by virtue of the alleged adverse possession of their father: *Clark v. Trindle*, 52 Pa. 492; *Allen v. Allen*, 58 Wis. 202,

16 N. W. 610; McDougal v. Bradford, 80 Tex. 558, 16 S. W. 619. The two cases are therefore entirely different. Here Josephine Barrett had a deed for the land which constituted color of title. She did not enter under this deed, and died at the age of eight years. The plaintiffs were not in actual possession of the land prior to the death of their father in 1897. They therefore had no title under which he could rightfully enter as their agent or trustee, but at the most only color of title, provided that they acquired the right to claim under the deed to their sister, Josephine Barrett, by virtue of descent cast, she not having had any seisin during her lifetime.

The case, therefore, presents this question: Will the father be presumed to have entered in behalf of his children, when ⁹² there is no evidence that he professed to do so, and none that they had any title, but at most only color, which would make this entry a trespass from the start? Is he presumed to have trespassed on another's land and to have subjected himself to a suit for damages by the true owner in order to ripen the colorable title of his children into a good and perfect one by continuing to hold the possession a sufficient length of time for that purpose? We think this would be pushing the doctrine of presumption a great way, and that the father cannot, under the given circumstances, be presumed to have been acting for his children. He may be in a certain sense their natural guardian or protector, but no such duty as that supposed can be held to rest upon him. His possession commenced by disseisin, and if it had continued long enough, it might have ripened into a good title, but it would have been a title which accrued to him, and not to his children.

When there is a mixed possession by several persons the law adjudges the legal seisin to be in him who has the title: Hall v. Powell, 4 Serg. & R. 465, 8 Am. Dec. 722; Langdon v. Potter, 3 Mass. 215; Codman v. Winslow, 10 Mass. 146; Commonwealth v. Dudley, 10 Mass. 403; Cheney v. Ringgold, 2 Har. & J. (Md.) 87; Newell on Ejectment, p. 366. But no such case is presented here, as the possession was taken and maintained by the father apparently for himself, and besides, during the time he was in possession of the land the plaintiffs did not have the title, nor were they the owners of it, but they had merely a deed to their sister, which they claimed to be color of title.

We held in *Francis v. Reeves*, 137 N. C. 269, 49 S. E. 213, that there is no presumption that the husband is the agent of his wife and acting for her, and we do not see why we should hold that the father is the agent of his children and acting for them when he takes possession of land and commits a trespass in doing so. Is there anything in the relation of parent and ⁹³ child which casts the duty upon him of committing a trespass in their behalf so as to raise a presumption that in such case he is acting for them? We think not. There being no evidence that Robert Barrett was acting for his children and none from which such an inference should be drawn, his possession did not inure to them so as to perfect any colorable title they may have had.

The defendants were not bound to except to the instruction as to the "force and bearing of R. W. Barrett's possession for his children," as there was no evidence to warrant the same, and they had already moved to dismiss the action.

The court should, therefore, have granted the defendant's motion to nonsuit the plaintiffs under the statute, and in refusing to do so there was error, for which the judgment is reversed and the action dismissed.

The Essential Elements of Adverse Possession are discussed in the note to *De Frieze v. Quint*, 28 Am. St. Rep. 158. What constitutes color of title within the meaning of the law of adverse possession is the subject of a note to *Power v. Kitching*, 88 Am. St. Rep. 701.

COMMISSIONERS v. TRUST COMPANY.

[143 N. C. 110, 55 S. E. 442.]

STATUTES—Passage—Entries on Legislative Journal.—An entry on a legislative journal that "The bill passed its third reading. Ayes 34, noes —, as follows," followed by a list of those voting in the affirmative, with no further reference being made to those voting in the negative, shows that the bill was passed by a unanimous vote, and that there were no names to be recorded in the negative, and complies with a constitutional requirement that the ayes and noes shall be entered on the journal. (p. 792.)

MUNICIPAL CORPORATIONS — Ordinances — Three-fourths Vote.—If a city charter provides that the board of commissioners may create a debt, only after they have passed an ordinance by a three-fourths vote of the entire board, the words "entire board" mean all the members of the board in existence at the time that such ordinance is passed, and not all of those originally elected. (p. 794.)

Suit to enforce a contract to purchase municipal bonds. The defendant claimed that the bonds were unauthorized and therefore void. Judgment for plaintiff. Appeal by defendant.

A. H. Eller and Peele & Maynard, for the plaintiffs.

Manly & Hendren, for the defendant.

¹¹¹ BROWN, J. It is contended by the defendant that the bond issue is void for two reasons: 1. Because the charter of the town of Salem, authorizing the issue, was not passed by the General Assembly and the ayes and noes entered on its journals in accordance with article 2, section 14 of the constitution of this state; 2. Because the ordinance directing the issue of the bonds and submitting the question to a vote of the people was not passed by a three-fourths majority of the entire board of commissioners of the town, as required by the charter.

In respect to the first objection made to the validity of the bonds, it is admitted that the journals of the House of Representatives are entirely regular and that the bill was passed by the House in strict conformity to the organic law. But on its passage by the Senate it is contended that the negative votes were not recorded. The entries on the Senate Journal in respect to this bill are as follows: "Senate Journal, Senate Chamber, January 23, 1891. The bill passed its second reading. Ayes, 39, noes —, as follows." Then follows a list of those voting in the affirmative, without any reference to those voting in the negative. "The bill passed its third reading. Ayes, 34, noes —, as follows." Then follows a list of those voting in the affirmative, with no further reference to those voting in the negative.

It is admitted that the case of *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3, is an express authority sustaining defendant's contention. After much reflection, we are unwilling to follow the decision of the court in that case, in so far as it holds that the entries upon the journal do not indicate that there were no negative votes. In the dissenting opinion of Mr. Justice Clark it is said: "The expression 'Passes by the ¹¹² following vote: Ayes, 94 (giving names), nays —,' is as express and intelligent declaration that there were no negative votes as if the word 'none' had been used. Nays —, after the words 'passes by the following vote,' and giving those

voting 'Aye,' can convey no other meaning. Is it not hypercritical to say that 'Nays ——' did not mean that there were no names in the negative?"

This provision in our constitution serves an important purpose in compelling each member present to publicly assume his share of the responsibility in the passage of such legislation, but more particularly in furnishing conclusive evidence whether the bill has been passed by a constitutional majority. In passing upon a similar question the supreme court of Illinois says: "The constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative." "It must appear on the face of the journal that the bill passed by a constitutional majority": *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Cooley's Constitutional Limitations*, 7th ed., 201.

The entries upon the Senate Journal give the names of a large majority of the total membership of that body as voting for the passage of this bill upon the second and third readings, so that there can be no question of its passage by a constitutional majority. But the entries indicate further that the bill passed by a unanimous vote and that there were no names to be recorded as voting in the negative. This identical question was considered by the circuit court of appeals, fourth circuit, in the case of *Commissioners of Onslow County v. Tollman*, 145 Fed. 753, a case originating in this state. In his opinion, Judge McDowell, referring to *Dehnam v. Chitty*, 131 N. C. 657, 43 S. E. 3, says: "After the most careful consideration that we have been able to give the subject, we find ourselves unable to adopt the construction given the clause in question by the learned supreme court of North Carolina." So are we ¹¹⁸ unable to agree with our predecessors, and in that respect we overrule the decision referred to.

It is next contended that the ordinance under which the election was held to authorize said issue of bonds was not passed by the board of commissioners of the town of Salem as prescribed by the charter. Section 70 of said chapter reads as follows: "That under the powers hereby conferred upon the board of commissioners, they may borrow money or create a public debt only after they have passed an ordinance by a three-fourths vote of the entire board at two separate regular meetings." There were originally elected seven commissioners as prescribed by the charter; one had resigned, leaving six members of the board at the time of the second passage

of the ordinance. At the meeting of the board, when the ordinance was alleged to have been passed the second time, only five members of the board were present, all voting for the passage of said ordinance.

It is argued by the defendant that the ordinance is not valid unless passed by three-fourths of the entire board; that the entire number is seven, and five is not three-fourths of seven; that in the construction of the language of the charter there cannot be taken into consideration vacancies, however bona fide they may be, and the language means three-fourths of the entire board provided for by the charter.

The authorities which the learned counsel for the defendant have called to our attention do not bear out his contention that the language of the charter should be construed as if it read three-fourths of the entire board elected. Such a provision is not uncommon in charters of municipal corporations, and the fact that the word "elected" was omitted after the word "board" is indicative to us that the legislature intended that three-fourths of the entire membership of the board in existence at the passage of the ordinance should have power to pass such an ordinance. Wherever the special provision ¹¹⁴ in such charters contains the words "entire board elected," or similar terms, it is invariably held that all the members elected must be taken into account: Dillon on Municipal Corporations, sec. 281. We are unable to find any judicial decision which places the same construction upon the words "entire board," when the word "elected" does not follow.

The term "board," when used in municipal charters, seems to have two meanings—one abstract, having reference to the legislative creation, the corporate entity, which is continuous and the other referring to its members, the individuals composing the board. The words "entire board," as used in the Salem charter, refer to the membership of the board, and were evidently inserted to guard against hasty municipal legislation by requiring three-fourths of all the members to concur. As the board, the corporate body, was composed of only six members when this ordinance was finally adopted, five of its members being present and voting for its passage, the requirements of the charter were fully complied with. So in a case where the power of motion was conferred upon a municipal council to be exercised "by a vote of three-fourths of that body," this was held to give the power of removal to

three-fourths of a legal quorum. Three-fourths of the members elected were not required: *Warnock v. Lafayette*, 4 La. Ann. 419. In South Carolina it is held that where, of eighteen managers (a board constituted to try a certain election) appointed by the legislature, two refused to qualify, one was disqualified and one was dead at the time the board of managers convened, the remaining fourteen, being all the members in esse, properly constituted the board and might act by a majority of the fourteen: *State v. Deliesseline*, 10 S. C. 52. It is held in Missouri that an amendment is ratified by the "House" within the meaning of the constitution of that state when it is ratified by two-thirds of a legal quorum; that when a legal quorum was present, that was in ¹¹⁵ law the "House": *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636. See, also, *Sanders v. Ellington*, 77 N. C. 255.

In construing the meaning of the words, "with the concurrence of a majority of the justices of the peace," this court has held that, where a majority of the justices of the county are assembled, the justices were in legal session, and a majority of that majority could legally act: *Cotton Mills v. Commissioners*, 108 N. C. 678, 13 S. E. 271.

We are of the opinion, therefore, in this case that the words "entire board" mean all the members of the board in existence and not all those originally elected. When the five members assembled they constituted a legal board, and a majority of that five had the right to pass any ordinary matter; but as to borrowing money or creating indebtedness, such ordinances must receive the sanction of three-fourths of the then membership of the board, whether present or not.

Affirmed.

A Majority of the Members of a Legislative Body constitutes a quorum, in the absence of a constitutional provision by the power creating the body: *State v. Ellington*, 117 N. C. 158, 53 Am. St. Rep. 580. The word "house" as applied to a branch of the legislature means a number of members sufficient to constitute a quorum to do business; and an amendment to the constitution ratified by two-thirds of a majority of all the members elected is ratified by two-thirds of that house: *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636.

The "Majority of the Electors" referred to in a constitution as requisite to the ratification of an amendment thereto means the majority of the electors voting upon the question of amendment, and not a majority of all the electors of the state or of those voting at the election: *Green v. State Board of Canvassers*, 5 Idaho, 130, 95 Am. St. Rep. 169.

SHEPARD v. WESTERN UNION TELEGRAPH COMPANY.

[143 N. C. 244, 55 S. E. 704.]

TELEGRAPH COMPANIES—Delay in Delivery of Telegram—Presumption of Negligence.—If a telegram is not delivered until one week after it is sent, the law presumes negligence on the part of the telegraph company, but such presumption is rebuttable. (p. 796.)

TELEGRAPH COMPANIES—Delay in Delivery—Burden of Proof.—In an action to recover for negligent delay in the delivery of a telegram, the burden as to the negligence is upon the plaintiff; and after all the evidence, direct and in rebuttal, is in, it is still the duty of the plaintiff to satisfy the jury by a preponderance of the evidence that the defendant was guilty of negligence. (p. 797.)

EVIDENCE—Burden of Proof.—The party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced. (p. 798.)

TELEGRAPH COMPANIES—Delay in Delivery of Telegram. In an action to recover for mental anguish caused by negligent delay in the delivery of a telegram, an instruction on the issue of damages that the jury had "a right to take into consideration their own feelings" is erroneous. The jury has only a right to give the plaintiff recompense for the anguish he has suffered from the negligence of the defendant, to be determined, not by their own feelings, but by the evidence. (p. 798.)

TELEGRAPH COMPANIES—Delay in Delivery of Telegram—Evidence of Mental Anguish.—In an action to recover for mental anguish, caused by the negligent delay in the delivery of a telegram, the plaintiff is competent to testify that he was greatly grieved, and that it almost killed him, because of such delay he could not be at his father's deathbed and funeral. (p. 798.)

EVIDENCE—Mental Anguish.—If close relationship exists, mental anguish caused by death is presumed, but this does not exclude more direct proof by the plaintiff's own testimony. (p. 798.)

Holmes & Valentine and B. A. Justice, for the plaintiff.

Merrick & Bernard, for the defendant.

245 CLARK, C. J. The court charged the jury: "The message not having been delivered until a week afterward, the law presumes negligence on the part of the defendant company, but it is not such a presumption as could not be rebutted. But it requires proof on the part of the defendant by the greater weight of the evidence that it did exercise due care in the effort to deliver the message." The first paragraph was correct, the latter incorrect.

The burden of the issue as to negligence was upon the plaintiff. If no evidence had been offered in rebuttal, the court might have told the jury that if they believed the evidence, to answer that issue "Yes." But when evidence was offered in rebuttal, it was not incumbent upon the defendant to prove it by a preponderance of testimony, but upon all the testimony it was the duty of the plaintiff to satisfy the jury by a preponderance of the evidence that the defendant was guilty of negligence. This has been recently discussed: *Board of Education v. Makely*, 139 N. C. 31, 51 S. E. 784, citing a very apposite passage from 1 Elliott on Evidence, section 139:

"The burden of the issue, that is, the burden of proof, in the sense of ultimately proving or establishing the issue or case of the party upon which such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party²⁴⁶ who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party, or because the scales are equally balanced."

In criminal cases, where a homicide with a deadly weapon is proved or admitted, there is a presumption of law that the killing is murder, and the burden is on the prisoner to prove all matter in mitigation or excuse to the satisfaction of the jury (*State v. Matthews*, 142 N. C. 621, 55 S. E. 342); and when a totally independent defense is set up, as insanity, which is really another issue (*State v. Haywood*, 94 N. C. 847), the burden of that issue is on the prisoner. But the burden of the issue as to the guilt of the prisoner, except where the law raises a presumption of law as distinguished from a presumption of fact, remains on the state throughout, and when evidence is offered to rebut the presumption of fact

raised by the evidence, the burden is still on the state to satisfy the jury of the guilt of the prisoner upon the whole evidence. Notably, when the prisoner offers proof of an alibi, for example, which goes to the proof of the act: *State v. Josey*, 64 N. C. 56.

Nor can we approve his honor's instruction that the jury had "a right to take into consideration their own feelings." If this was correct, damages would depend not upon evidence, but upon the difference in the feelings of the individuals composing a jury. A jury has no right to do more than give the plaintiff a fair recompense for the anguish he suffered from the negligence of the defendant, the amount to be determined, not by their own feelings, but by the evidence: *Cashion v. Western Union Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160.

The plaintiff testified that he was greatly grieved, and it almost killed him because he could not be at his father's deathbed and funeral. This evidence was competent. It is ²⁴⁷ true that where close relationship exists mental anguish is presumed, but this does not exclude the more direct proof by the plaintiff's own testimony. In *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427, a similar exception was said to be "without merit": See, also, *Hunter v. Western Union Tel. Co.*, 135 N. C. 458, 47 S. E. 745, where it is said that mental anguish "is a matter of proof, and may be inferred from all the surrounding circumstances, as well as the personal testimony of the plaintiff." In *Harrison v. Western Union Tel. Co.*, 143 N. C. 147, 55 S. E. 435, Brown, J., says that "the condition of the mind is as susceptible of proof as the state of the digestion, and can be proved by the personal testimony of the sufferer." But for above errors in the charge there must be a new trial.

The Damages Recoverable Against Telegraph Companies for negligence in the transmission and delivery of telegrams are considered in the recent note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 276.

The Question of When a Presumption of Negligence arises is discussed in the note to *Cincinnati Traction Co. v. Holzenkamp*, 113 Am. St. Rep. 986. The presumption of due care is the subject of a note to *Chicago etc. Ry. Co. v. Wilson*, 116 Am. St. Rep. 108.

PETERSON v. SOUTH AND WESTERN RAILWAY COMPANY.

[143 N. C. 260, 55 S. E. 619.]

RAILROADS—Licensees—Persons Entering Cars to Make Purchases.—A railroad company carrying on its cars venders of fruit, confectioneries, or newspapers for sale to its passengers, does not invite or induce the public to enter into them at stations for the purpose of making purchases, and a person who is in the habit of entering the cars for that purpose without objection, inducement or invitation on the part of the company or its employé, is a mere permissive licensee. (p. 801.)

RAILWAYS.—Persons Entering a Car to Purchase Fruit or Other Things Sold Thereon, Assume the Risk, and cannot recover in the absence of wanton injury. Hence, they cannot recover for injury due to a sudden starting of the train. (p. 804.)

J. C. Biggs, for the defendant.

²⁶⁰ CONNOR, J. Moses Peterson, on his own behalf, testifies: "I was at Hunt Dale, in this county, May 2, 1903. I went up on the train to that place and got off about 12 o'clock; the train returning passed there about 5 or 6 on its way to Johnson City. I live in Yancey county, and was about to start home on my wagon when the train came on, but while it was stopped at station I went on the train to purchase some lemons. It ²⁶¹ was a mixed train, and I got on a freight-car where the lemons were. There was a door on each side. There were steps to the door and up which I went. Moses Wilson and Van Adkins went on with me. There was a man in there standing in one corner and had lemons and some other fruit to sell. They were in the rear end of the car. The car doors were about four feet wide. Both doors were open. I reached him a dollar and told him to give me three lemons. He says, 'The train is going to start in a minute.' I says, 'Well, hand me the dollar and I'll get out of here.' He handed me the dollar, and as he reached it to me it dropped on the floor. I stooped down to pick it up. The train started and gave a jerk and threw me out of the door. I had picked up the dollar and was straightening up when the train gave the jerk. There was no signal given of the movement of the train either by the bell or whistle. It threw me five or six feet to the door and out of the door on the ground. The door was nearly four feet from the ground, and I fell five or seven feet from the car on my left side and leg,

and broke both bones in my left leg. I don't know that it was the custom of the railroad company to sell lemons and other fruit from that car. It was the first time I had ever been there. I was not intoxicated. I had only taken one drink that day; it was just before dinner. When the jerk came I was five or six feet from the door, toward the back end. Adkins and Wilson were both out before I was thrown. When the man said, 'The train is about to start,' they went out the other door from the one I was thrown out. The train had been delayed at the stop at that station for about half an hour on account of their screwing up some parts of the engine. I did not get out when the others got out because I wanted my dollar. It dropped on the floor. I can't say whether the man dropped it or I."

Enoch Bennett testified: "I don't know that the railroad company kept fruit for sale in the car, but I know that somebody ²⁶² sold fruit in that car, for I have purchased it there myself, and I have seen other people than passengers get things in there. They would go in there and come out eating oranges or other things. I was there for four months. There was no alarm given of the starting of the train that I know of. I was near enough to have heard it. It was the custom of the train at that point to give notice before starting. It started that day with a sudden jerk. There were two or three trains a day passing along there. I can't say whether the bell rang or the whistle sounded the 3d of May, but was the common thing for them to do it. I don't know whether the car had doors in the ends or not. I think Moses went in the side of the door."

J. R. Hughes testified: "It was the general custom that they sold fruit in them at the different stations. They sold oranges, lemons, and other fruits. They had been selling that way for two or three months. What I saw of people purchasing fruit was generally they went to the door and the fruit was handed out to them, but I had seen persons that I remember now go in the car and purchase the fruit. I saw it sold besides Hunt Dale, at Poplar Station and Relief; the first once, the last twice. Part of the time they would ring the bell or the conductor would throw up his hand and holler 'All aboard!' The train started out faster than I ever knew it to do before. I think I recollect that the conductor was in such a position sometimes that he could have seen people who went in the car to purchase fruit."

Moses Wilson testified: "I went in car with plaintiff. He went in first. There were end doors to the car, and I went up the steps and in at one of the end doors. When I got near the man who was selling the fruit, he said, 'The train is going to start.' Peterson says, 'Hand me my dollar.' I started to get off the car. I went at once and went through the front end door and down the steps. I was four or five steps from the ²⁶³ end door. Directly I got off, the train started and seemed to start sudden. I had just cleared the steps. It seemed to be a sudden jerk, a little more than common. It was for two or three weeks the general custom for people to go in car to purchase fruits and ginger-pop. I had bought these myself. Sometimes at the door; sometimes, when I thought I had time, I would go inside. The selling of fruit from the car had been carried on in the previous summer, not so much in the winter months. They kept ginger-pop on ice in the summer. They did not keep ice there in winter. There are no side steps to the side doors. I had just passed in the car and gone some two or three steps when the man told me the train was going to start. The man said, 'The train is going to start in a minute, boys; get off.' "

Plaintiff rests. Defendant moves for a judgment of nonsuit. Refused, and defendant excepts. From a verdict and judgment for plaintiff, defendant appeals.

The plaintiff was neither a passenger nor an employé. He had no contractual relation with defendant, hence it owed him no contractual duty; nor did defendant owe him any duty in respect to its business as a carrier of passengers. The rights and duties of the parties are therefore not, in any degree, affected by the fact that defendant was employed in the business of a common carrier.

For the purpose of disposing of the exception presented upon the appeal, the car was the property and under the control of defendant, subject to the same power of management as the premises of a private citizen. Taken in the light most favorable to the plaintiff, he was upon the car by virtue of a permissive license in the pursuit of his own business, with ²⁶⁴ which defendant had no connection or concern. It cannot be successfully contended that, by carrying on its cars vendors of fruit and confectioneries or newspapers for sale to its passengers, the company invites or induces the public to enter into them at stations for the purpose of making purchases. Besides being foreign to its legitimate business, to

do so would seriously interfere with its power to discharge the duty imposed by law, to carry passengers with all reasonable dispatch and safety.

It is not necessary to hold, nor do we hold, that plaintiff was a trespasser, although we see no good reason why the defendant's agents and employes may not have forbidden plaintiff to enter the car for the purpose of buying fruit, just as a private citizen may forbid any person to come upon his premises. His failure to do so is no more than a permissive license. If there be any evidence of an existing custom by which persons were in the habit of going into the car at stations for the purpose of buying fruit, it is very slight. It is very doubtful whether, when analyzed, there is any evidence of such custom. One witness, who undertakes to so testify, says: "What I saw of people purchasing fruit was, generally, they went to the door and the fruit was handed out to them; but I had seen persons, that I remember now, go in the car and purchase fruit. At Hunt Dale once and Poplar Station twice." Another witness says: "It was for two or three weeks the general custom for persons to go in the car and buy." The plaintiff says that he had never heard of such a custom. It was the first time he was ever there. It would impose hard lines upon the owner of premises—and, in respect to the plaintiff, the defendant occupies that position—if by permitting persons, in a few instances, to enter thereupon for their own purposes or convenience, a custom or usage should be established, imposing upon such owners the degree of care imposed in the case of invited guests or persons going in for the purpose of transacting business with the owners: ²⁸⁵ *Winder v. Blake*, 49 N. C. 332; *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850; 12 Cyc. 1028.

Discussing the question involved in this appeal, Boynton, J., in *Pittsburgh R. R. Co. v. Bingham*, 29 Ohio St. 374, 23 Am. Rep. 751, says: "It is therefore a right that the public have to enter upon the premises of the company at points designed or designated for receiving passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry. It, however, cannot be extended beyond this. For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the

corporate property is as perfect and absolute as that of an owner of real property not burdened with public or private easements or servitudes."

Conceding, however, that there was evidence sufficient to be submitted to the jury, and that they found in accordance therewith, nothing more is shown than that, without objection on the part of defendant, persons usually went into the cars for the purpose of buying fruit; it cannot, as matter of law, amount to more than a permissive license, and in respect to the duty imposed upon the owner to one thus entering, the rule is well settled. "A licensee who enters upon premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk and enjoys the license subject to its concomitant perils. . . . Here permission is neither inducement, allurement nor enticement": *Pittsburgh etc. R. R. v. Bingham*, 29 Ohio St. 374, 23 Am. Rep. 751.

In a case involving the same principle, *Burbank v. Illinois Cent. R. R. Co.*, 42 La. Ann. 1156, 8 South. 580, 11 L. R. A. 720, McEnery, J., says: "It is not stated in the petition, nor is there any evidence to show that the plaintiff was in the habit of going to ²⁰⁶ the train to solicit custom for her boarding-house. . . . Her presence on the platform, and at the depot, was not for the purpose of transacting any business with the company . . . or for any purpose for which the depot had been built. She was at the depot, it is true, by a general license from the company, in the absence of any express prohibition. It would not be practical for a railroad company . . . to designate particular individuals who should be permitted to enter its depot. But there was no express or implied invitation to the plaintiff to go to the depot and on the platform. . . . There must have been, on the part of the company, such gross and wanton negligence that it was equivalent to intentional mischief," to make it liable.

We had occasion to discuss the question regarding the measure of duty which defendant owed the plaintiff, as a mere permissive licensee, in *Quantz v. Southern R. R. Co.*, 137 N. C. 136, 49 S. E. 79, and find that the conclusion reached in that case is sustained by the additional authorities cited by the learned counsel for defendant.

Is there any evidence of a breach of duty or the absence of the degree of care imposed upon defendant not to wantonly

injure plaintiff? The reason why it is negligent, in respect to passengers, to so manage the engine approaching or leaving a station as to suddenly jerk the cars, arises out of the duty of the engineer to know and keep in mind the fact that passengers and those who are entitled, by reason of relationship or otherwise, to accompany them, are usually in the act of going upon or leaving the car at stations: *Nance v. Carolina C. R. Co.*, 94 N. C. 619; *Tillett v. Norfolk etc. R. R. Co.*, 118 N. C. 1031, 24 S. E. 111; *Denny v. North Carolina R. R. Co.*, 132 N. C. 340, 43 S. E. 847. No such reason existed in respect to persons going upon the cars for purposes having no connection with the business of defendant as a carrier of passengers. The engineer cannot be presumed to know that persons are using the car for other purposes than as passengers or employes. If he were required to await the pleasure or ²⁶⁷ convenience of all persons who, from curiosity or other cause, were upon the cars, the common complaint of belated trains, with all of the attendant inconvenience, damage and dangers to travelers, would increase more than tenfold. To require the company to keep guards at the doors of their cars to prevent persons going in for other than proper purposes would be impracticable. It is well known that the cars are for passengers, and that, save within the exceptions noticed, no one else is entitled, as of right, to go into them. In many towns and cities, ordinances are made prohibiting persons having no business from going upon cars. In the absence of such ordinances, the only reasonable and workable rule is that which the law prescribes—in respect to passengers the highest degree of care in the handling and movement of trains; in regard to mere permissive licensees, abstention from wanton injury. It is hardly possible to move a train of cars, especially a mixed train, as this one, without some jerk or jolt: *Smith v. Richmond & D. R. R. Co.*, 99 N. C. 241, 5 S. E. 896. Persons going upon them must take notice of the necessity of some jerk or jolt when the train moves. Of course if the conductor or anyone having control of the train had seen the plaintiff on the car he should have warned him that it was about to move. It is said, however, that no signal was given that the train was about to leave the station. More than one answer may be given to this suggestion; the defendant owed no duty to plaintiff to give a signal; again, the plaintiff was told that the train would leave “in a minute.” He does not claim that he did not have time to get off; the fact

is, that the other persons who went in with him did get off safely. The cause of his injury was that either he or the fruit vender dropped the coin, and plaintiff was trying to recover it, thereby delaying his movement in leaving the car. Certainly the engineer could not be expected to know that some one was on the car buying lemons, that a coin had been dropped and that it would require some time to recover it; nor is there any evidence that anyone ²⁶⁸ connected with the train knew that plaintiff was on the car. The fruit vender, who was on the same car, is not shown to have been jerked or jolted. The evidence that the jerk was any more severe than was proper or necessary in moving the train, as "made up," was very slight.

The plaintiff when he went into the car, on his own business, without invitation or inducement or, as he says, any knowledge of any custom for persons to do so, but simply by the silent acquiescence of defendant's agents, took the risk incident to the movement of the train.

In the absence of any evidence of breach of duty on the part of the defendant, the motion for nonsuit should have been allowed. For refusal to do so the judgment must be reversed: *Hollingsworth v. Skelding*, 142 N. C. 246, 55 S. E. 212.

A Railway Company is not liable for the accidental death of a boy permitted by the conductor, against its rules, to ride gratuitously on the train to sell newspapers: Duff v. Allegheny R. R. Co., 91 Pa. 458, 36 Am. Rep. 675. See, too, Padgitt v. Moll, 159 Mo. 143, 81 Am. St. Rep. 347. As to the duty of a railway company to persons entering a car to assist a passenger taking passage thereon, see Seaboard Air Line Ry. v. Bradley, 125 Ga. 193, 114 Am. St. Rep. 196; as to its duty to a person assisting to make a shipment of goods, see State v. Western Maryland R. R. Co., 98 Md. 125, 103 Am. St. Rep. 388; and as to its liability to persons going to its station for business purposes or to meet passengers, see Duhme v. Hamburg-American Packet Co., 184 N. Y. 404, 112 Am. St. Rep. 615; Klughberz v. Chicago etc. Ry. Co., 90 Minn. 17, 101 Am. St. Rep. 384, and cases cited in the cross-reference note thereto.

CHEROKEE TANNING EXTRACT COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

[143 N. C. 376, 55 S. E. 277.]

CONTRACTS—Offer and Acceptance.—If a letter from one person to another states, "Kindly advise us by wire Monday if you can use 1,500 creosote barrels between now and January 1st at 95 cents, delivered in carload lots," such letter is a mere trade inquiry, and is not a legal offer, binding on acceptance. (p. 807.)

CONTRACTS—Offer and Acceptance.—An offer, to constitute a contract, must be one which is intended of itself to create legal relations on acceptance, and if it is an offer merely to open negotiations which may ultimately result in a contract, it is not binding. (p. 807.)

CONTRACTS—Offer and Acceptance.—An acceptance of an offer to constitute a contract and bind the other party must be unconditional and unqualified, and must correspond exactly to the terms of the offer. (p. 808.)

Action for damages from negligent delay of the defendant to transmit and deliver a telegram. Judgment for plaintiff. Appeal by defendant.

Dillard & Bell, for the plaintiff.

Merrick & Barnard and T. H. Busbee & Son, for the defendant.

376 BROWN, J. There is no dispute as to the material facts. The evidence shows that on November 7, 1903, an agent of the Standard Oil Company at Wilmington, North Carolina, wrote to the plaintiff, at Andrews, North Carolina, a letter containing, among other things, this request: "Kindly advise us by wire Monday if you can use about 1,500 creosote barrels between now and ³⁷⁷ January 1st, at 95 cents each, delivered in carload lots." That the plaintiff received this letter on Monday, November 9th, and at 7:30 P. M. of that day filed with the defendant, at its Andrews office, a message addressed to the Standard Oil Company, Wilmington, North Carolina, and reading as follows: "We accept your offer 1,500 barrels as per yours of the 7th." This message was delivered to the sendee at 10:36 A. M., November 10th. At the same time it wrote to plaintiff, the oil company addressed a similar letter to the Brevard Tanning Company and others. The latter company purchased the barrels by telegram received by the oil company shortly before plaintiff's message. The plaintiff claims substantial damage. Defend-

ant requested the court to charge that plaintiff was entitled to recover nominal damages only, to wit, the price paid for the telegram. We think this instruction should have been given.

Damages are measured in matters of contract not only by the well-known rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, but they must not be the remote, but the proximate, consequence of a breach of contract, and must not be speculative or contingent. Unless the reply of plaintiff by wire to the letter of the oil company created a contract between the two for the sale and delivery of fifteen hundred barrels at ninety-five cents each, then plaintiff can recover only nominal damages, for any other damages would necessarily be purely speculative or contingent. The language of Brannon, J., in a similar case in West Virginia is appropriate to this: "But the trouble facing the plaintiff in this case is that there was no final contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegraph company did not cause the breach of a consummate contract; it only prevented one that might or might not have been made": *Beatty L. Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309. See, also, *Richmond Hosiery* ³⁷⁸ *Mills v. Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290, and *Wilson v. Western Union Tel. Co.*, 124 Ga. 131, 52 S. E. 153. The offer must be distinct as such and not merely an invitation to enter into negotiations upon a certain basis: *Cheney-Bigelow Wire Works v. Sorrell*, 142 Mass. 442, 8 N. E. 332; *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155; 24 Am. & Eng. Ency. of Law, 1029, and cases cited.

Again, the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract: *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664; 24 Am. & Eng. Ency. of Law, 1030, note 1, and cases cited. "The offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer merely to open negotiations which will ultimately result in a contract": 1 *Paige on Contracts*, sec. 26, and cases cited; *Clark on Contracts*, sec. 29.

In *Moulton v. Kershaw*, 59 Wis. 316, 48 Am. Rep. 516, 18 N. W. 172, the defendants wrote to the plaintiff as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full carload lots of 80

to 75 barrels, delivered at your city at 85 cents per barrel to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order." The plaintiff at once telegraphed the defendant: "Your letter of yesterday received and noted. You may ship me two thousand barrels Michigan fine salt as offered in your letter." The defendant declined to deliver the salt, and plaintiff sued for damages. The supreme court of Wisconsin, sustaining a demurrer to the complaint, held that the communications between the parties did not show a contract; that the letter of the defendant was not such an offer as plaintiff could by an acceptance change into a binding agreement: See, also, *Smith v. Gowdy*, 90 Mass. 566.

The letter from the oil company to the plaintiff was a mere inquiry: *Walser v. Western Union Tel. Co.*, 114 N. C. 440, 19 S. E. 366. It ³⁷⁹ was evidently a "trade inquiry" sent out by the oil company to customers, and did not purport and was not intended to be a legal offer binding on acceptance. "Care should be taken always not to construe as an agreement letters which the parties intended only as preliminary negotiations": *Lyman v. Robinson*, 14 Allen (Mass.), 242.

Again, the acceptance by the plaintiff was not in the terms of the offer. The acceptance was for fifteen hundred barrels. The oil company could not have compelled the plaintiff to take a less number. If the plaintiff regarded the oil company's letter as a valid offer, it should have replied that it would take what barrels the oil company had, not exceeding fifteen hundred, as that company had offered no exact specific number. "An acceptance, to bind the other party, must be unconditional and unqualified, and must correspond exactly to the terms of the offer": 24 Am. & Eng. Ency. of Law, 1031, 1032, and cases cited; 1 Parsons on Contracts, 476, 477. As the plaintiff's message to the oil company seasonably delivered would not of itself have effected a legal contract between the plaintiff and the oil company for the delivery of fifteen hundred barrels at ninety-five cents each, it follows that any other than nominal damage would be purely speculative. The oil company might have delivered the barrels, and then again it might not have done so. It might have delivered fifteen hundred, and again it might have

delivered a much less number. Its letter specified no exact number, and it was under no legal compulsion to deliver any.

As the defendant manifests its willingness to pay nominal damages, it is unnecessary to consider the exceptions to his honor's rulings on the issue of negligence. We award a new trial upon the second issue relating to the damages.

Partial new trial.

The Principal Case is supported by Moulton v. Kershaw, 59 Wis. 316, 48 Am. Rep. 516.

BOURNE v. SHERRILL.

[143 N. C. 381, 55 S. E. 799.]

CONTRACTS—Statute of Frauds—Collateral Agreement—Consideration.—If, at the time land is conveyed, as an inducement thereto and in part consideration for the sale and delivery of the deed, the grantee orally agrees that, if he does not build and resells the land, the grantor is to have the profits of such resale, such agreement is not without consideration, nor is it within the statute of frauds. (p. 810.)

Action to recover amount realized by defendant on his resale of property sold to him by plaintiff. Verdict and judgment for plaintiff. Appeal by defendant.

L. Craig, for the plaintiff.

J. C. Martin, for the defendant.

382 HOKE, J. There was evidence of plaintiff tending to show that plaintiff sold and conveyed to defendant a lot in Asheville for which he had been offered a larger price by another, under assurance that defendant desired to build on the lot as a home for himself and wife.

That at the time the lot was conveyed to defendant, as an inducement thereto, and in part consideration for the sale and delivery of the deed, defendant then agreed that if defendant did not build, but resold the lot, that plaintiff was to have the profits realized on such resale.

That shortly after obtaining the title, the defendant resold the lot at a profit, and plaintiff instituted the present suit to recover the profits pursuant to the agreement.

Defendant objected to the introduction of any and all of this testimony and to any recovery predicated thereon, on

the grounds (1) that the agreement was without consideration; (2) that the same contradicted the deed; (3) that the contract was invalid under the statute of frauds, the same being a contract concerning realty, and required to be in writing.

The decisions of this state are against the defendant on each of the propositions advanced by him: *Michael v. Foil*, 100 N. C. 178, 6 Am. St. Rep. 577, 6 S. E. 264; *Sprague v. Bond*, 108 N. C. 382, 13 S. E. 143.

The consideration arose at the time of the sale, and as part inducement thereto.

The conveyance, the purpose of which was to pass the title, is allowed its full operation, and is therefore in no wise contradicted. And the agreement enforced by this recovery attached to the proceeds from and after the sale, and was not, therefore, concerning land, or any interest therein, within the meaning of the statute of frauds.

³⁸³ In *Michael v. Foil*, 100 N. C. 178, 6 Am. St. Rep. 577, 6 S. E. 264, it was held: "At the time of the delivery of a deed for land, and as a part of the inducement for its execution, it was orally agreed between the vendor and vendee that if the vendee should sell the mineral interest in the land during vendor's life he would pay the vendor one-half of the amount received therefor: Held, that such agreement could be shown by oral evidence, and did not come within the statute of frauds."

In *Sprague v. Bond*, 108 N. C. 382, 13 S. E. 143, it was held as follows: "S., being the owner of certain lands, conveyed them by deed absolute to B., upon the parol promise of the latter, from the proceeds of any sale the vendee might make, after paying expenses, etc., the vendor should be paid a part: Held, not to be within the statute of frauds." And Shepherd, judge, delivering the opinion, said: "The enforcement of the alleged agreement, after the sale of the land, does not in any respect impinge upon the terms of the conveyance, but relates entirely to the payment of the consideration. It is true that the plaintiff could not have compelled the defendant to execute her agreement to sell the land, as there was no enforceable trust, and the agreement was within the statute of frauds, but this part of the agreement has been voluntarily performed, and the other part, not being within the statute, may now be enforced."

This last opinion refers with approval to the case of *Hess v. Fox*, 10 Wend. 436, in which Savage, C. J., delivering the opinion in a similar case, said: "No question can arise on the validity of the agreement to sell. That was performed, and the remaining part was to pay over money, supported by the consideration of land conveyed to the promisor."

These authorities are decisive against defendant, and the judgment below is affirmed.

No error.

For Authorities Supporting the Principal Case, see the note to McCoy v. McCoy, 102 Am. St. Rep. 238, on what amounts to a contract for the sale of land within the meaning of the statute of frauds.

HELMS v. WESTERN UNION TELEGRAPH COMPANY.

[143 N. C. 386, 55 S. E. 831.]

TELEGRAPH COMPANIES—Delay in Delivery of Message—Recovery for Mental Anguish.—If there is nothing on the face of a telegram to reasonably charge the telegraph company with the knowledge that the plaintiff was the real beneficiary, and that his son, who signed the message, was acting as his agent, and nothing to charge the company with notice that plaintiff might suffer mental anguish if the telegram was unreasonably delayed, he cannot recover therefor. (p. 812.)

TELEGRAPH COMPANIES—Delay in Delivery of Message—Damages for Mental Anguish.—One who is not mentioned in a telegraphic message, and whose interest therein is not communicated to the telegraph company, cannot recover substantial damages for mental anguish arising from negligent delay in delivering, or failure to deliver, the message. (p. 813.)

TELEGRAPH COMPANIES—Delay in Delivery of Message—Measure of Damages.—If a message is sent for the benefit and at the instance of one whose name does not appear on its face, and the telegraph company is not informed of the nature of the transaction to which the message relates, nor of the position which the plaintiff would probably occupy, the measure of damages for negligent delay in the delivery of the message is the sum paid for sending it, and there can be no recovery for mental anguish. (p. 814.)

Action by one M. A. Helms against the telegraph company to recover damages for mental anguish caused by the failure of such company to promptly deliver to his son in law a message which he had sent through his son, John Helms, as follows: "Will Helms, Charlott, N. C. Mother very sick.

Come at once. (Signed) John Helms." Judgment for plaintiff. Defendant appealed.

Burwell & Causler, for the plaintiff.

Tillett & Guthrie, for the defendant.

³⁸⁷ BROWN, J. The exceptions of the defendant to the evidence and to the charge of the court raise two questions for our consideration: 1. Is there any evidence which charges the defendant with knowledge that John Helms filed the telegram as the agent of and for the benefit of his father, M. A. Helms? 2. Can this plaintiff sustain an action for damages for mental anguish without proving such fact?

As to the first contention of the defendant, we think the evidence tends to prove that John Helms, twenty-six years old, and the son of M. A. Helms, filed the telegram with the operator at Pineville; that the operator asked for the number and street of the sendee; that John Helms said he did not know it; that the operator said he could not send the message until he got the address; that John Helms went back to his father and got the address; that he told the operator that his father knew the street number; that the operator knew John Helms and also knew the plaintiff; that John Helms told the operator that the sendee, Will Helms, was his brother in law, and that the plaintiff sent John Helms to send the message and gave him the money to pay for it, but John Helms failed to so inform the operator.

We think there is nothing in the evidence which could reasonably charge the defendant with knowledge that the plaintiff was the real beneficiary and that his son was acting as his agent in sending the message. There is nothing in the evidence or on the face of the message which charges the defendant with notice that M. A. Helms, the plaintiff, may suffer mental anguish if the telegram is unreasonably delayed: *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 18 Am. St. Rep. 37, 13 S. W. 70.

As to the second contention, we are likewise of opinion with the defendant. The overwhelming weight of authority is to the effect that a party who is not mentioned in a message or ³⁸⁸ whose interest therein is not communicated to the company cannot recover substantial damages for mental anguish: *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Western Union Tel. Co. v. Proctor*, 6 Tex. Civ. App. 300,

25 S. W. 811; *Weatherford etc. Ry. Co. v. Seals* (Tex. Civ. App.), 41 S. W. 841; *Elliott v. Western Union Tel. Co.*, 75 Tex. 18, 16 Am. St. Rep. 872, 12 S. W. 954; *Western Union Tel. Co. v. Brown*, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766.

This doctrine is nowhere more emphatically declared than by the supreme court of Texas, where the doctrine of mental anguish is supposed to have originated. In *Southwestern T. & Tel. Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686, that court affirmed its former ruling to the effect that a party whose interest in the telegram was not made known to the company could not recover. There appears in this opinion the significant statement by the court that the court had "already expressed its disinclination to extend the right of recovery in this class of cases beyond the limits already fixed by the decisions of this court." In *Davidson v. Western Union Tel. Co.*, 21 Ky. Law Rep. 1292, 54 S. W. 830, and *Morrow v. Western Union Tel. Co.*, 107 Ky. 517, 54 S. W. 853, the court of appeals of Kentucky held that a party whose name was not mentioned in the message could not recover for mental anguish.

In *Rogers v. Western Union Tel. Co.*, 72 S. C. 290, 51 S. E. 773, the supreme court of South Carolina, after referring to the rule of *Hadley v. Baxendale*, 9 Ex. 341, as controlling these mental anguish cases, then proceeded to hold that the party whose interest was not disclosed could not recover. The headnote correctly digests the opinion in these words: "Where a husband sends a telegram to his wife's mother, and it does not show on its face that it is for the benefit of his wife, and it is not alleged in the complaint that the telegraph company had notice that the telegram was sent for the benefit of the wife, the complaint fails to show that she was entitled to damages for failure to deliver."

In *Poteet v. Western Union Tel. Co.*, 74 S. C. 491, 55 S. E. 113, Mr. Justice Woods, speaking for that court, discusses the matter with much clearness of expression: "In cases of this character the suit is usually for the tort committed in breach of the public ³⁸⁹ duty owed to the plaintiff; but the duty springs out of the contract and depends on it, for manifestly the defendant owes no public duty concerning a particular telegram except to those for whom or in whose behalf it has undertaken to transmit it. All others are of the outside public, and damages which they incidentally suffer cannot by any stretch be regarded the natural and prox-

mate result of failure to transmit a particular telegraphic message. The contract fixes the relation, and he who sues for tort based on contract must show privity with the party to be charged by connecting himself with the contract as a party or a known beneficiary. In further support of this view, it may be remarked that as to the subject matter of a telegram it is too well established for discussion, before there can be a recovery the telegraph company must have notice that the particular result alleged as the basis of the claim was to be apprehended from delay in transmission. The same principle makes it necessary to recovery that there should be notice to the company of the beneficial interest of the particular person who claims compensation for suffering." In his opinion the learned justice cites a large number of authorities in support of his views.

The right of the sendee to recover of a telegraph company for error or negligence in the transmission or delivery of a telegram is altogether denied in Great Britain: *Playford v. United etc. Tel. Co.*, L. R. 4 Q. B. 706. In this country the English doctrine does not generally prevail. Here the weight of authority holds that the sendee may recover in his own name such damage as he may have sustained by reason of negligence when the message was intended for his benefit and it was apparent on the face of the message or the company otherwise had knowledge of it: 2 *Shearman and Redfield on Negligence*, 5th ed., sec. 543; *Joyce on Electric Law*, sec. 1008; *Frazier v. Western Union Tel. Co.*, 45 Or. 414, 78 Pac. 330, 67 L. R. A. 320.

The same principle applies where the message is sent for the benefit and at the instance of anyone whose name does not appear on its face. The well-known rule laid down in *Hadley v. Baxendale*, 9 Ex. 345, decided in 1854, has been applied by the supreme court of the United States to telegraph cases, and it is held that where the telegraph company is not informed of the nature of the transaction to which the message relates, or of the position which the plaintiff in the action would probably occupy, the measure of damages for negligence is the sum paid for sending: *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. Rep. 1098, 38 L. ed. 883; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, 31 L. ed. 479.

Our own court has adopted the same principles of law as applicable to this class of cases. In a well-considered opinion

in *Williams v. Western Union Tel. Co.*, 136 N. C. 82, 48 S. E. 559, Mr. Justice Walker says: "The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its own terms or is made known by information given to the agent receiving it in behalf of the company for transmission, no damages can be recovered for failure to correctly transmit and deliver it beyond the price paid for the service." In *Cranford v. Western Union Tel. Co.*, 138 N. C. 162, 50 S. E. 585, the plaintiff was not permitted to recover because her interest in the telegram was not shown upon the face of it and was not brought to the attention of the company, and it is specifically held that "there can be no recovery of damages for delay in the transmission and delivery of a telegram when it does not appear in any way that the plaintiff was the intended beneficiary of the message": See, also, *Kennon v. Western Union Tel. Co.*, 126 N. C. 232, 35 S. E. 468.

In conclusion, we regard it as well settled in this court now, as well as in all other courts whose decisions we have examined, that where there is a delay in the delivery of a telegram, the telegraph company is not liable for the mental anguish of everyone suffering by the failure to deliver the message, but only to those for whom or in whose behalf it has undertaken to transmit it. We will not undertake to reconcile ³⁹¹ *Cashion v. Western Union Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160, with the principles herein laid down. Whatever there may be that is conflicting with them in that case we regard as having been heretofore disregarded and practically overruled. We are of opinion that the plaintiff is entitled to recover nominal damages only, viz., the price paid for the message.

New trial.

Mr. Chief Justice Clark Dissented, and said: "The defense relied on is that it does not appear that the operator was told (except inferentially) that the message was sent by John Helmes as agent for his father. When a telegraph company fails to deliver a message, or to deliver it promptly, this is more than the breach of a private contract, for the company could not refuse to accept and send the message. It is a tort and a breach of a public duty. It is commonly described as a tort arising out of a breach of contract.

"In *Green v. Western Union Tel. Co.*, 136 N. C. 489, 103 Am. St. Rep. 955, 49 S. E. 165, 67 L. R. A. 985, Douglas, J., said, speaking

for a unanimous court: 'In the words of a great English judge, "a breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."' This has been expressly held by this court in *Cashion v. Western Union Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160, *Landie v. Western Union Tel. Co.*, 124 N. C. 528, 32 S. E. 886, and *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431, 74 S. E. 490.'

"Whether the message, as to which there is such default, is one whose default causes pecuniary loss or mental anguish, the party entitled to sue must be the 'real party in interest,' and comes within one of two categories: either (1) a party to the contract or (2) a beneficiary named therein.

"1. He may be a party to the contract by being either the sender whose name is signed to the message, or the principal (whether disclosed or not) who paid for the message or by whose order the message was sent. Whether the breach caused pecuniary loss or mental anguish, the telegraph company must have contemplated that damages would accrue to the real sender of the message. *Qui facit per alium facit per se*. Whether his name was signed to the message or not, it is the damage that would accrue to him, if any, which the company contemplated that it would incur by its negligence. It is not to be thought that a public corporation would be more faithful in sending a message for one party than another: *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734. Very frequently the signer of the message (as in this case) is a mere agent, a messenger, and in such cases he receives no damages and can recover none. The company is not thereby shielded, but is responsible to the 'real party in interest,' the principal, by whose order the message was sent, for the damage he sustained, whether pecuniary loss or mental anguish, when the face of the message disclosed that the failure to deliver would be likely to cause the loss of money (*Cannon v. Western Union Tel. Co.*, 100 N. C. 300, 6 Am. St. Rep. 590, 6 S. E. 731), or mental suffering (*Young v. Western Union Tel. Co.*, 107 N. C. 370, 22 Am. St. Rep. 883, 11 S. E. 1044, 9 L. R. A. 669). That is the gist of it. The real sender of the message is entitled to recover, whether his name is signed thereto or an agent signs his own name. Whether the real or the nominal sender is the plaintiff is a mere matter of proof, as is the plaintiff's relationship to the sick or dying person named in the message. When that is shown, it is his loss, of course, which is the measure of damages. He is the real contracting party.

"2. Sometimes the sender of the message, whether he sends it in his own name or sends it in the name of his agent, is not the real party in interest. In such case the sender cannot sue (*Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 Am. St. Rep. 557, 6 S. E. 770); but the beneficiary of the message may, if the fact that he is the beneficiary appear upon the face of the message. This may be either

the sendee or one named in the message. This is upon the principle laid down in *Gorrell v. Greensboro W. S. Co.*, 124 N. C. 328, 70 Am. St. Rep. 598, 32 S. E. 720, 46 L. R. A. 513, and cases following it, 'that one for whose benefit a contract is made may sue for its breach or its enforcement.'

"Thus, either (1) the maker of the contract, whether he contracts in his own name or in the name of an agent, can sue for whatever damage he sustains, or (2) the beneficiary of the contract, who is contemplated as such on the face of the message, can sue. Of course, a person who is neither a party, as principal or agent, to the contract, nor a beneficiary named therein, cannot recover: *Cranford v. Western Union Tel. Co.*, 138 N. C. 162, 50 S. E. 585.

"Accordingly, our reports show that in the great majority of the cases the action has been brought by the beneficiary named in the message, usually the sendee, but sometimes one referred to in the message. In the other cases, the action has always been brought by the contracting party—this being sometimes the signer of the message and sometimes the undisclosed principal, with whose money or by whose order the telegram was delivered to the telegraph company for transmission.

"The action was brought by—

"Sender: *Kennon v. Western Union Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *Bennett v. Western Union Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Williams v. Western Union Tel. Co.*, 136 N. C. 82, 48 S. E. 559; *Green v. Western Union Tel. Co.*, 136 N. C. 506, 49 S. E. 171; *Hancock v. Western Union Tel. Co.*, 137 N. C. 497, 49 S. E. 452, 69 L. R. A. 403; *Hall v. Western Union Tel. Co.*, 139 N. C. 369, 52 S. E. 50; *Geroch v. Western Union Tel. Co.*, 142 N. C. 22, 54 S. E. 782; *Hancock v. Western Union Tel. Co.*, 142 N. C. 163, 55 S. E. 83.

"Sender and sendee: *Andrews v. Postal Tel. Co.*, 119 N. C. 403, 25 S. E. 955; *Dowdy v. Western Union Tel. Co.*, 124 N. C. 522, 32 S. E. 802; but it has been since strongly intimated that it is a misjoinder for two persons, suing each for his own mental suffering, to unite in the same action: *Morton v. Western Union Tel. Co.*, 130 N. C. 299, 41 S. W. 484.

"Undisclosed principal of sender, seven cases: *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427; *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493; 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160 (fully discussed); *Landie v. Western Union Tel. Co.*, 124 N. C. 528, 32 S. E. 886; *Laudie v. Western Union Tel. Co.*, 126 N. C. 431, 78 Am. St. Rep. 668, 35 S. E. 810; *Hood v. Western Union Tel. Co.*, 135 N. C. 622, 47 S. E. 607; *Hamrick v. Western Union Tel. Co.*, 140 N. C. 151, 52 S. E. 232 (in this last a new trial was given on another point, but there was no objection on this point suggested by the court).

“Sendee: *Young v. Western Union Tel. Co.*, 107 N. C. 370, 22 Am. St. Rep. 883, 11 S. E. 1044, 9 L. R. A. 669; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427; *Brown v. Western Union Tel. Co.*, 111 N. C. 187 (pecuniary loss); *Lewis v. Western Union Tel. Co.*, 117 N. C. 436, 23 S. E. 319; *Havener v. Western Union Tel. Co.*, 117 N. C. 540, 23 S. E. 457; *Lyne v. Western Union Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543; *Rosser v. Western Union Tel. Co.*, 130 N. C. 251, 41 S. E. 378; *Hunter v. Western Union Tel. Co.*, 130 N. C. 602, 41 S. E. 796; *Meadows v. Western Union Tel. Co.*, 131 N. C. 73, 42 S. E. 534; 132 N. C. 40, 43 S. E. 512; *Eflrd v. Western Union Tel. Co.*, 132 N. C. 267, 43 S. E. 825; *Hinson v. Postal Tel. Co.*, 132 N. C. 460, 43 S. E. 945; *Higdon v. Western Union Tel. Co.*, 132 N. C. 726, 44 S. E. 558; *Bryan v. Western Union Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *Hunter v. Western Union Tel. Co.*, 135 N. C. 458, 47 S. E. 745; *Dayvis v. Western Union Tel. Co.*, 141 N. C. 79, 51 S. E. 898; *Alexander v. Western Union Tel. Co.*, 141 N. C. 75, 53 S. E. 657; *Whitten v. Western Union Tel. Co.*, 141 N. C. 361, 54 S. E. 289; *Mott v. Western Union Tel. Co.*, 142 N. C. 532, 55 S. E. 363; *Harrison v. Western Union Tel. Co.*, 143 N. C. 147, 55 S. E. 435; *Shepard v. Western Union Tel. Co.*, 143 N. C. 244, ante, p. 726, 55 S. E. 704.

“Beneficiary named in message (these are really cases of disclosed principals, but who neither paid for nor ordered the sending of the messages): *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94; 116 N. C. 655, 21 S. E. 429; 117 N. C. 352, 23 S. E. 277; *Green v. Western Union Tel. Co.*, 136 N. C. 489, 103 Am. St. Rep. 955, 49 S. E. 165, 67 L. R. A. 985; *Carter v. Western Union Tel. Co.*, 141 N. C. 374, 54 S. E. 274; *Kernodle v. Western Union Tel. Co.*, 141 N. C. 436, 54 S. E. 423.

“In *Cranford v. Western Union Tel. Co.*, 138 N. C. 162, 50 S. E. 585, it is clearly shown that one who suffers loss (it must be immaterial whether it is a money loss or mental suffering) by the failure to deliver a telegram cannot recover damages on that account unless he also shows that he is a party to the contract (either as sender or as principal) or beneficiary (by being named therein or the sendee). The language of the court is, after quoting *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493, and 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160, and *Landie v. Western Union Tel. Co.*, 124 N. C. 528, 32 S. E. 886: ‘In each of those cases we need only say, without discussing the principle upon which they rest, there was abundant evidence to show that the message was sent for the benefit of the plaintiff [the undisclosed principal], the sender merely acting as her agent, while in this case there is no such evidence.’

“That language exactly applies here. The principle stated in those cases cited in *Cranford’s* case (138 N. C. 162, 50 S. E. 585)

has been recognized by this court seven times, as above stated. It is reasonable, logical and just, and there is no reason why we should overrule them. Besides the seven decisions above referred to, it was said in *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94: 'The plaintiff can therefore maintain this action both because his sister was his agent for the purpose of sending the telegram and because he was the beneficial party.' Yet in that case the plaintiff had not directed the sending, and paid for the message, as in this case, but had merely left authority to telegraph in case of sickness, and had no knowledge of the message being sent until long afterward. 'The message may be written out, signed, and delivered by an agent': *Scott & Jarnagan on Telegraphs*, 161. 'The contract is not necessarily with the party whose name is signed to the message': *Scott & Jarnagan on Telegraphs*, 177.

"Here the evidence discloses that in truth the plaintiff sent the message through the agency of his son, and paid for it. The relationship of the principal and his agent was known to the operator. The message concerned the critical illness of the plaintiff's wife and was sent to the husband of his daughter, and John Helms told the operator that he 'would go back' to his father and get the sendee's street number, and did so. All these were pregnant circumstances to give the defendant notice that the message was sent by the plaintiff's order. But, if that were not so, the above authorities, several in number, hold, unless all are overruled, that the plaintiff, if an undisclosed principal, can recover for the default in the delivery of a message. The defendant relies upon *Cranford's* case (138 N. C. 162, 50 S. E. 585). But that case, instead of overruling *Cashion's* and *Landie's* cases, cites them as not being in conflict with itself. *Cranford's* case rested on three propositions: (1) That the message, so far as the evidence disclosed, was sent solely for the benefit of the husband of the plaintiff; (2) that there was no evidence that the defendant knew that such a person as the feme plaintiff existed; (3) that there was no evidence that the message was sent for her benefit. The lack of evidence in the foregoing particulars was the controlling factor in the decision of that case.

"In the case at bar it affirmatively appears by the uncontradicted evidence (1) that the message was sent and paid for by the plaintiff; (2) that the operator knew the relationship between John Helms and the plaintiff, and his attention was called to it before the message was sent, by the son saying he 'would go back' to his father and get the sendee's street number; and (3) that the message was sent for the plaintiff's benefit. In *Cranford's* case it is said: 'Nor is there any evidence that the message was in fact intended for the benefit of the feme plaintiff. The defect in the proof last mentioned is sufficient of itself to defeat the plaintiff's recovery.'

“To sum up, it is not necessary that the company should have notice, at the time, who is the real sender. Its duty is the same, whether the sender, sendee or principal of the sender is the ‘real party in interest.’ It is sufficient if the telegram on its face gives notice that failure to deliver will cause mental suffering or pecuniary loss, and that at the trial the evidence shall show that such damages accrued to the plaintiff, who shall further show that he was the real (not the mere nominal) sender of the dispatch, or that it was sent for his benefit as sendee or beneficiary named in the message. That the undisclosed principal can recover is held: *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734.

“No case has been cited and it is believed that none can be found which denies the right of the real sender, he who orders the message sent and pays for it, to recover damages for failure to deliver, whether he was known to the company or not, and whether the damages are for money lost or mental suffering, caused by the defendant’s negligence. At least seven times this court has ruled that such principal, being the real party to the contract, can recover. The cases cited in the opinion of Brown, J., of *Morrow v. Western Union Tel. Co.*, and the others, which hold that a plaintiff whose name is not mentioned in the message cannot recover, refer to beneficiaries of the message, and are in exact accord with what is said in this dissent. Those decisions do not disqualify the real party to the contract, the principal who paid for and sent the message, and whose agent signed it. This view is sustained by the text and cases cited in *Jones on Telegraphs*, section 469.

“*Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734, holds that it is immaterial that the telegraph company is not informed by the signer of the message that it is sent in behalf of and paid for by an undisclosed principal. The company is liable to the latter for any mental anguish caused by its negligence.”

Damages Against Telegraph Companies for mental anguish caused by their negligence in the transmission or delivery of telegrams are discussed in the recent note to *Kagg v. Western Union Tel. Co.*, 117 Am. St. Rep. 286.

CANNADAY v. ATLANTIC COAST LINE RAILROAD COMPANY.

[143 N. C. 439, 55 S. E. 836.]

CONTRACTS—Lex Loci Contractus—Exceptions.—Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made, except when it is contrary to good morals, or when the state of the forum or its citizens would be injured by its enforcement, or when the contract violates the positive legislation of the state of the forum, or when it violates the public policy of such state. (p. 823.)

CONTRACTS—Conflict of Laws—Comity.—If a person enters into a contract of employment with a railroad company in one state, and also a contract with it by which he agrees that his acceptance of benefits from it for injuries sustained should operate as a release and satisfaction of all claims against the company growing out of such injuries, and he is injured in that state by the company's negligence and accepts and receives such benefits, and the courts of that state have interpreted such contract as an agreement to elect, in case of injury, either to accept the benefits and release the company, or waive them and sue for negligence, and that an election to accept benefits is a release of the action for negligence, such interpretation is binding on the courts of another state, and in such case no action can be maintained therein. (p. 825.)

Z. V. Taylor and E. J. Justice, for the plaintiff.

Rose & Son and King & Kimball, for the defendant.

440 CONNOR, J. This was an action for the recovery of damages for personal injury. The facts material to the decision of the appeal were as follows: The jury found upon issues submitted to them that the plaintiff was injured by the negligence of the defendant, and that he did not, by his own negligence, contribute thereto. By way of further defense, defendant alleged that, prior to his employment, plaintiff entered into a contract pursuant to which he became a member of the Relief Department, an organization formed by the several companies constituting the Atlantic Coast Line Railroad Company for the purpose of establishing and managing a fund for the payment of definite amounts to the employes contributing thereto, entitling them when disabled by accident or sickness, or their families, in cases of death, to certain amounts, the basis of which was fixed in said contracts. The said contract is set out in full, and among other provisions, contains the following: "I also agree that, in consideration of the amounts paid and to be paid by said company for the maintenance of said Relief Department, and of the guarantee

by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company, and all other companies ⁴⁴¹ associated therewith in the administration of their Relief Department, for damages arising from or growing out of said injury; and further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of said Relief Department, of all claims against said Relief Department, as well as against said company, and all other companies associated therewith, as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against said company or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said Relief Department and of said company created by my membership in said Relief Fund, shall thereupon be forfeited without any declaration or other act by said Relief Department or said company." It is further alleged that after the injuries sustained, plaintiff received benefits pursuant to the said contract, evidence of which was set out in the record. Upon this defense, the following issues were submitted to and found by the jury:

"Was the plaintiff, at the time of his alleged injury, a member of the Relief Department of the Atlantic Coast Line Railroad Company in South Carolina, and did he agree to be bound by the rules and regulations of said Relief Department? A. Yes."

"Did the plaintiff, after his injury, and before the bringing of this action, accept and receive benefits from said Relief Department for said injury? A. Yes."

It is admitted that the contract of employment was made in South Carolina, and that the contract, by which plaintiff became a member of the Relief Department, was also made ⁴⁴² in said state. That the service into which plaintiff entered was "as engineer to run an engine and train of cars from Florence in said state to Augusta in the state of Georgia." That the injury for which the action is brought occurred in the state of South Carolina, and that the acceptance of benefits under the provisions of the contract as found by the jury

was in said state. There was judgment for plaintiff upon the verdict, and defendant appealed.

It is settled that "Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made": *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245. "The interpretation of a contract and the rights and obligations under it, of the parties thereto, are to be determined in accordance with the proper law of the contract. Prima facie the proper law of the contract is to be presumed to be the law of the country where it is made": *Dicey's Conflict of Laws*, 563. *Bowen, L. J.*, in *Jacobs v. Credit Lyonnais*, 12 Q. B. 589, says: "It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention": 9 Cyc. 667.

The principle is illustrated in *Bridger v. Asheville & S. R. R. Co.*, 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860. The action was for injuries alleged to have been sustained in North Carolina by the negligence of defendant. The defense of contributory negligence being pleaded, the question was whether, as held by the courts of this state, the age of the plaintiff precluded the defendant from relying upon it, and ⁴⁴³ the decision of this question was made to depend upon the decisions of the courts in North Carolina. *Simpson, C. J.*, said: "The injury was inflicted there, and if the parties had remained in that state, and brought action there, they would have been compelled to stand or fall by the law there. And we cannot see, upon principle, how stepping over the line could give plaintiff a new and altogether enlarged cause of action—in fact, a cause of action which he did not have before, and, therefore, which he could not have enforced in the tribunals having jurisdiction of the matter at its origin. . . . In such case, the plaintiff having no cause of action in North Carolina, where the injury was inflicted, he could have none here."

The principle has been recognized and enforced by this court in *Watson v. Orr*, 14 N. C. 161; *Anderson v. Doak*, 32 N. C. 295; *Williams v. Carr*, 80 N. C. 294; *Hancock v. Western Union Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A.

403; Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50.

The exceptions to the general rule are thus stated by Mr. Lawson, the editor of the excellent and exhaustive article on "Contracts," in 9 Cyclopaedia, 674: "The general doctrine that a contract, valid when it is made, is valid also in the courts of any other country, or state, when it is sought to be enforced, even though had it been in the latter country or state, it would be illegal, and hence unenforceable, is subject to several exceptions: (1) When the contract in question is contrary to good morals; (2) when the state of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; (3) when the contract violates the positive legislation of the state of the forum; that is, is contrary to its constitution or statutes; and (4) when the contract violates the public policy of the state of the forum. These exceptions are grounded on the principle that the rule of comity is not a right of any state or country, but is permitted and accepted by all civilized communities ⁴⁴⁴ from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return": Note 49; Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835.

We are thus brought to a consideration of the question whether the courts of South Carolina have interpreted the contract and passed upon the effect, upon his cause of action, of the election made by the plaintiff to accept benefits from the Relief Department by reason of his injuries. This inquiry invites an examination of two questions: 1. Does the contract, as interpreted by the courts of South Carolina, undertake to release the defendant in advance from all claim or demand for injury sustained by reason of its negligence? Or 2. Is it an agreement to elect, in the event of such injury, either to accept the benefits provided by the contract and release the company, or waive the benefit and sue on the cause of action? If the first be the proper interpretation of the contract, the question would arise whether it is not within one of the exceptions to the general rule of comity as stated by Mr. Lawson. If the second is the correct view, no such question can arise. The answer, of course, is dependent, not upon the interpretation which we would put upon it, but what

interpretation the courts of South Carolina have put upon the contract.

The defendant relies upon the case of *Johnson v. Charleston & S. R. R. Co.*, 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645. The plaintiff insists that, by reason of the course which that case took in the courts of South Carolina, the final result did not "become the law of the state, but merely of that case." The contention renders it necessary for us to notice the history of the case.

The action was brought by the plaintiff, an employé, for the purpose of recovering damages for injuries sustained by the alleged negligence of the defendant. In addition to denial ⁴⁴⁵ of liability on the alleged cause of action, the defendant by way of special defense set up a contract in all respects as the one before us, alleging the receipt of benefits under it, and release from all claim or demand for damages. The plaintiff demurred orally to the "second affirmative defense," assigning as grounds of demurrer that the contract set out therein "was contrary to law and against public policy, and a release thereunder cannot be pleaded as a defense to an action for damages caused by the defendant's negligence." The demurrer was overruled by Judge Watts, circuit judge, who said: "There is no question in my mind that a contract of this kind, whereby a railroad company attempts to relieve itself of any liability on account of negligence, is contrary to public policy, and when the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company. It seems in this case that the plaintiff had entered into that agreement, relieving the railroad company, before he was injured. After he was injured, he was put to his election as to whether he would sue the company, or go ahead and carry out the contract, and receive the benefits of that contract. It seems to me that the decision in the case of *Price v. Richmond & D. R. R. Co.*, 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413, would control this case, and I think the plaintiff, having elected to receive the benefits under that contract, is now estopped from bringing his action against the railroad company." The basis of his honor's judgment overruling the demurrer becomes material because of the subsequent course which the case took. The plaintiff appealed, stating five separate exceptions to the judgment. It is not necessary to set them out here. The supreme court of South Carolina consists of a chief justice and

three associates. To provide for the contingency arising when, upon appeal, the justices were equally divided in opinion, it is declared by section 12, article 5, of the constitution, that the concurrence ⁴⁴⁶ of three of the justices shall be necessary to a reversal of the judgment below. Provision is made for the decision in such a contingency when a constitutional question is involved, by which the circuit judges are called to the assistance of the justices in the decision of such question. In *Johnson v. Charleston S. Ry. Co.*, 55 S. C. 152, 32 S. E. 3, 33 S. E. 174, 44 L. R. A. 645, the justices were equally divided. Mr. Justice Pope writing an opinion concurred in by Mr. Justice Gary, for reversal of the judgment. Chief Justice McIver writing an opinion referred to as "dissenting," concurred in by Mr. Justice Jones, for affirming.

In this condition of the case it is held by a unanimous court in *City of Florence v. Berry*, 62 S. C. 469, 40 S. E. 871, that when "a judgment is affirmed by a divided court, such a judgment must be regarded as a judgment of the supreme court, and as such is binding authority in all subsequent cases, until it is overruled by competent authority." In view of the rule of comity, therefore, the interpretation and validity of the contract must be treated by us as settled by the courts of South Carolina. The principle announced by Simpson, C. J., in *Bridger v. Asheville & S. R. R. Co.*, 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860, applies with peculiar force. The plaintiff had no cause of action in South Carolina, and therefore has none here. Merely crossing the state line cannot enlarge or give a cause of action which he did not have in the state whence he came. Every fact and circumstance affecting the cause of action occurred in South Carolina.

This is conclusive of the appeal unless, as contended by the plaintiff's counsel, the form of the pleading presents the question whether the defendant is seeking to use, not as a shield, but as a weapon, a contract which violates the settled policy of this state, or is prohibited by our employer's liability act: Revisal, sec. 2646. The plaintiff's view is that he has established by the verdict of the jury a cause of action for an injury sustained by reason of the defendant's negligence, upon which he would recover but for the affirmative ⁴⁴⁷ defense, relied on by the defendant, which, being executory, this court is asked to specifically enforce. That, in respect to the contract, the defendant is the actor demanding affirmative relief. We do not concur in this view. Whatever may have

been the character of the contract prior to the execution of the release by the plaintiff, by that act the cause of action was released for all legal and practical purposes, and extinguished.

In the courts of South Carolina the defendant pleads release by way of affirmative defense, and not as a counter-claim or cross-action. It is as if it had pleaded payment or accord and satisfaction, by which it avers that the plaintiff had, at the time of bringing the suit, no cause of action. This was the status of the matter in South Carolina, and it is in no respect different here. Did the court in South Carolina enforce the original contract, holding it not to be against public policy, or did it so interpret it that no release of a cause of action for negligence was affected by the contract, but that the release executed after the injury, in consideration of benefits received, operated to extinguish the cause of action?

While there is apparently some divergence of view between the learned justices who wrote opinions in Johnson's case, the prevailing opinion by the then chief justice, although called in the reports of the case "dissenting," clearly indicates that the decision, following the language used by Judge Watts, is put upon the interpretation of the contract. The chief justice says: "In the outset I desire to say what would seem to be needless, but for the fact that it appears to have been thought necessary to expend much time and labor upon the point, that I do not suppose anyone doubts that a contract, whereby a railroad corporation or any other common carrier undertakes to secure immunity from liability for damages resulting from the negligence of the carrier ⁴⁴⁸ or any of its servants or agents, is contrary to public policy, and therefore void. But the question here is whether the contract or arrangements set up in the affirmative defense is a contract for immunity from damages. I do not think it can be so regarded, for, on the contrary, the very terms of the contract necessarily assumed that the defendant is liable, and the whole scope and effect of the contract is to fix the measure of such liability and the manner in which such liability shall be satisfied." The learned chief justice proceeds to quote from a case decided by the supreme court of Pennsylvania: "He is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby": *Johnson v. Philadelphia etc. R. R. Co.*, 163 Pa. 127, 29 Atl. 854. He then

proceeds to analyze the terms of the contract, setting forth clearly and forcibly his interpretation of it.

We have no doubt that the decision is based upon two propositions: 1. That the contract made in advance to exempt a railroad company from liability for its negligence is contrary to public policy and void. It is so, independent of the constitutional provision in South Carolina, or our statute, which is in almost the same terms: *Harrill v. South Carolina etc. R. R. Co.*, 135 N. C. 601, 47 S. E. 730. 2. That the contract as interpreted by the court does not have that effect. The case was heard before the special tribunal provided by the constitution of South Carolina upon the suggestion that a constitutional question was involved. By a per curiam opinion, the judgment was affirmed for the reason that no constitutional question was presented. This view relieves us from considering the other branch of the controversy.

It is conceded that the courts which have passed upon this form of contract have almost uniformly sustained it, upon the ground stated by Judge McIver.

440 In deciding this appeal, we do not express any opinion upon the question, except to say that we fully concur in the opinion that a contract to exempt a railroad company from liability for negligence is void. We have uniformly and frequently so held. The question as to the interpretation of this contract, when, if ever, presented to this court, in a manner making it our duty to pass upon it, will be approached as an open question. We are informed that the question has been removed from the sphere of litigation by legislation in South Carolina. By the act of Congress, the contract or acceptance of benefits under it is declared not to be a bar to an action for damages. It may not be improper to say that the contract does not commend itself to our judgment. In this case it appears that the plaintiff paid into the Relief Department seventy-two dollars, and received, by way of benefits, sixty-eight dollars.

We must, in obedience to the well-settled law of comity, declare that the plaintiff, having no cause of action in South Carolina, has none in this forum. The judgment must be reversed, and judgment upon the verdict be entered for the defendant.

CLARK, C. J., Dissenting. It is established by the verdict in this case that the defendant was guilty of negligence in allowing a collision of two trains in South Carolina, resulting

in injuries to plaintiff, causing damages to him to the amount of eighteen hundred dollars, and that he was not guilty of contributory negligence. There is no exception calling in question the correctness of the trial in these respects. The defendant relies upon a discharge or release by reason of benefits received from the "Atlantic Coast Line Relief Department."

When the action is upon a contract made or a tort committed in another state, the laws of that state must be taken into ⁴⁵⁰ consideration in passing upon the liability of the defendant. But when liability is established without question, as in this case, the matter of a discharge, whether by payment, release or statute of limitations, is governed by the *lex fori*, the law of the place where the case is tried, and where such defense is to be allowed or disallowed. If a contract made in North Carolina, on which the statute of limitations is three years, is sued on in New York, where the limitation upon that class of contracts is six years, the defense is governed by the latter limitation, and vice versa, when a suit is brought in this state on a cause of action accruing in New York. In the same way, if the plea of payment or release is one which cannot be sustained in good conscience or is against the public policy of the state where the case is tried, the courts thereof will not hold it a valid defense to defeat a valid liability which the defendant has incurred elsewhere.

The release here set up is by virtue of a transaction by which the plaintiff, who had paid in seventy-two dollars, has received back sixty-eight dollars, and the defendant is insisting that that is a release of a liability for eighteen hundred dollars' damages legally ascertained, which the plaintiff has sustained by the wrongful act of the defendant. Such a defense is not good in *foro conscientiae*, and in that matter the courts here are to be governed by their own rules of equity. There has been no consideration for the release, and such being the case, the judge properly entered judgment in favor of the plaintiff upon the verdict.

It is strenuously argued by the able and learned counsel for the plaintiff that the "Atlantic Coast Line Relief Department" is an ingeniously devised plan to cause the employes of that company, at their own expense and by means of deductions from their wages, to insure the railroad company from liability for injuries sustained in its service, notwithstanding the provisions of the fellow-servant act, now Revised, 2646. It is not necessary to go into that matter, as

⁴⁵¹ it is apparent that there was no consideration for the release here set up. But the act in question affects a most meritorious class of our citizens, engaged in hazardous quasi-public service. They are deeply and vitally interested that judicial construction shall in nowise impair the just protection afforded them by that section, and especially by the last paragraph thereof: "Any contract or agreement, expressed or implied, made by any employé of such company to waive the benefit of this section, shall be null and void."

The Law of the Place Where a Contract is Made governs its validity and interpretation: Union Nat. Bank v. Chapman, 169 N. Y. 538, 88 Am. St. Rep. 614, and cases cited in the cross-reference note thereto. But contracts made in one state cannot be enforced in another if in contravention of its law, policy, or morals: Palmer v. Palmer, 26 Utah, 31, 99 Am. St. Rep. 820, and cases cited in the cross-reference note thereto.

An Agreement by an Employé of a Railway Company, upon becoming a member of its relief department, that an acceptance of benefits from the relief fund shall release the company from liability for damages in case of injury, is valid and binding upon an employé who voluntarily signs it and accepts the benefits: Chicago etc. R. R. Co. v. Curtis, 51 Neb. 442, 66 Am. St. Rep. 456; note to Missouri etc. Ry. Co. v. Smith, 107 Am. St. Rep. 615.

STATE v. HUNTER.

[143 N. C. 607, 56 S. E. 547.]

EVIDENCE OF FOOTPRINTS.—Evidence that a person accused of arson made a peculiar footprint, identified as his in the soft ground on the morning following the burning of the house, being plain and distinct, and leading from the place where the house stood, and evidence that his shoes fitted the tracks, is competent to go to the jury. (p. 831.)

EVIDENCE—Trailing by Dog.—Evidence that a bloodhound, trained to track human beings and nothing else, and often used for that purpose, was put upon the tracks of the accused, and followed him until he was "treed," is competent to go to the jury in corroboration of evidence identifying footprints of the accused. (p. 831.)

R. D. Gilmer, attorney general, and W. M. Bend, for the state.

L. L. Smith and Aydlett & Ehringhaus, for the defendant.

⁶⁰⁸ CLARK, C. J. Indictment for feloniously burning a storehouse in the night-time. There was evidence that the

ground behind the storehouse was soft and had been freshly plowed, and witness testified that next morning the prisoner's tracks were found there, leading off from the storehouse; that he had known prisoner all his life, and that the prisoner made a peculiar track; that having had white swelling when a boy, the prisoner's left leg was two or three inches shorter than the other; that this made him walk on his left toes, the heel of that foot not touching the ground unless that foot went very deep into the ground; that he knew prisoner's track well, and that these were his tracks; that no one else in that neighborhood made such tracks; that these tracks were plain and distinct; that they led up behind the gin-house so that the person making them was screened from the dwelling-house, and led off again to the road which went to the prisoner's house. Another witness testified that he carried his bloodhound there the afternoon succeeding the fire; that the tracks were peculiar (and such as were described by first witness); that his dog is a clear-blooded English bloodhound, well trained to track human beings; he had often used him for that purpose, and that the dog will track nothing else; that he put the dog on these tracks; that the dog followed them through the field and across the road, when he seemed to catch the scent of something in the air, whereupon he broke off through the woods, and when witness got up with the dog he had treed prisoner up a dogwood tree. That the prisoner said to witness, "What does this mean? I didn't do it." That they took off prisoner's shoes, and they fitted the tracks exactly.

There was evidence for prisoner and by him and evidence that his character was bad; but it is unnecessary to state prisoner's evidence, as the jury found for the state, and the exceptions are (1) the admission of any evidence of the ~~600~~ conduct of the dog; (2) the refusal of a mistrial and a continuance that the prisoner might obtain other evidence; (3) the refusal to charge that there was no evidence to go to the jury; (4) that though the court gave the prisoner's prayer that "the acts and doings of the dog are not evidence upon which you can rely as substantive evidence upon which you can convict the prisoner," the court added, "but are circumstances in corroboration of the state's testimony as to tracks: State v. Moore, 129 N. C. 494, 39 S. E. 626, 55 L. R. A. 96."

. There was no error. 1. The conduct of the dog was competent evidence: Underhill on Criminal Evidence, p. 438, n.

5; 1 Wigmore on Evidence, sec. 177 (2); *Hodges v. State*, 99 Ala. 10, 39 Am. St. Rep. 117, 13 South. 385; *Simpson v. State*, 111 Ala. 6, 20 South. 572; *Pedigo v. Commonwealth*, 103 Ky. 41, 82 Am. St. Rep. 566, 44 S. W. 143, 42 L. R. A. 432; *State v. Hall*, 3 Ohio N. P. 125. In the present case the requirement of other proof of the tracks being those of the prisoner, as stated in *State v. Moore*, 129 N. C. 494, 39 S. E. 626, 55 L. R. A. 96, was complied with. It is common knowledge that trained bloodhounds can follow the scent of a human track under such circumstances as here stated. The sense of smell in such animals is abnormally acute, and their conduct is at least sufficient as corroborative evidence to be submitted to a jury. Such animals are used by the state to track escaping convicts, and this has never been deemed illegal. Within the range of their intelligence the conduct of animals has always been deemed worthy of consideration. Among many instances, Lord Campbell in his life of Sir Thomas More (2 Lives of Lord Chancellors, 37) quotes that of the beggar-woman's little dog, which having been bought by his wife of a thief, the lord chancellor allowed the beggar-woman to prove her property by the dog's recognition of her. Then there is the classical incident of Ulysses, on his return from his memorable wanderings, being recognized by his dog Argos (who died from joy), when his family and his followers knew him not. There is the more modern incident of Aubry's dog ⁶¹⁰ of Montargis, who procured the confession of his master's murderer by his recognition of him. And there are many other incidents that can be readily recalled. A trial is a search after truth, and the law rejects no evidence, however humble, which in common knowledge may be a guide to a successful search. The evidence will always be submitted to the jury unless too remote to be of any probable assistance.

2. The refusal of a mistrial and continuance after the evidence was all in rested in the sound discretion of his honor, and is not reviewable.

3. His honor properly refused to withdraw the case from the jury. Independent of the corroborative evidence from the trailing by the dog, the evidence as to the identity of the tracks was before the jury: *Underhill on Criminal Evidence*, sec. 374; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493; *State v. Reitz*, 83 N. C. 634; *State v. Daniels*, 134 N. C. 641, 46 S. E. 743. There was also the remark of the prisoner,

when found up the tree, denying the crime, though he had not been charged with it.

4. The amendment of the prayer by adding that the trailing of the dog, though not substantive evidence, was corroborative, was in accord with what was said in *State v. Moore*, 129 N. C. 494, 39 S. E. 626, 55 L. R. A. 96.

No error.

Evidence of Trailing Persons by bloodhounds is the subject of a note to *Pedigo v. Commonwealth*, 82 Am. St. Rep. 575. Subsequent authorities on this question are *Parker v. State*, 46 Tex. Cr. Rep. 461, 108 Am. St. Rep. 1021; *McClurg v. Benton*, 123 Iowa, 368, 101 Am. St. Rep. 323.

The Comparison of Footprints is frequently resorted to as a means of identifying the guilty party, and there is no doubt that it is competent for a witness to testify that he has fitted the shoes of the accused in tracks found near the scene of the crime, and that they correspond with such tracks; or that he has measured tracks made by the accused or by the shoes of the accused, and measured tracks found near the place where the crime was committed, and that the measurements correspond: See the note to *State v. Height*, 94 Am. St. Rep. 342.

Am. St. Rep., Vol. 118—53

CASES
IN THE
SUPREME COURT
OF
OHIO.

**AETNA INSURANCE COMPANY v. STAMBAUGH-
THOMPSON COMPANY.**

[76 Ohio St. 138, 81 N. E. 173.]

AGENCY, REVOCATION OF, Notice of, When Essential.—If the authority of an insurance agent is revoked, notice of such revocation should be given to persons who have dealt with him as such agent. Otherwise, as to them, he will be deemed to have authority to represent his former principal and to bind it by contracts of insurance which he had authority to make before such revocation. (p. 837.)

INSURANCE, Cancellation of Policy, What Accomplishes.—The surrender of a policy of insurance to a person whom the assured believes to be the agent of the insurer, though his agency has in fact terminated, and the acceptance of another policy in its stead, implies a request that the former policy be canceled, and amounts to a cancellation thereof. (p. 839.)

INSURANCE, Cancellation of Policy, When not Avoided by Its Return.—If a policy is surrendered to a supposed agent of the insurer for the purpose of canceling it, his return of such policy at a later hour of the same day does not avoid the cancellation. (p. 839.)

INSURANCE, Time of Loss, When Controls.—The status of the insurer and the assured at the time of a fire must be reckoned with in working out their rights. (p. 840.)

RATIFICATION OF UNAUTHORIZED ACTS, Retrospective Effect of.—If an act is done and a contract made by a person acting as an agent, but without authority to do so, and such contract or act is ratified by the principal, the other party to the contract may rely thereon as against third persons as making the contract valid from the beginning. (p. 841.)

AGENCY, Transaction by Person Representing Two Adverse Parties.—If a person claiming to be the agent of an insurer obtains the surrender of a policy and the issuing of another in place thereof by another insurer of whom he is also the agent, the latter cannot avoid its policy on the ground that its agent, in what he did in procuring the surrender of one policy and the issuing of another, acted as an agent of both parties. (pp. 842, 843.)

Action against the Aetna Insurance Company to recover on a policy of fire insurance issued by it and claimed to be opera-
(834).

tive from noon of the twentieth day of May, 1904. The defendant sought to escape liability on account of a policy of insurance issued on the same property by the Connecticut Fire Insurance Company, which policy it claimed was in force at the time of the fire. This policy had been procured for the plaintiff shortly before the fire by V. J. Lamb, whom the plaintiff then believed to be the agent of the Connecticut Fire Insurance Company. Lamb was in fact an agent of the defendant, and as such he issued and delivered to the plaintiff the policy in suit, in the belief, both by him and the plaintiff, that the policy so surrendered had been canceled. Lamb, in what he did, did not act, and was not authorized to act, for the Connecticut Fire Insurance Company, but the plaintiff had no notice that Lamb's authority as agent of such company had terminated.

The case was tried before the court without a jury, which rendered judgment in favor of the plaintiff. An appeal was taken to the circuit court resulting in a judgment of affirmance by it.

J. W. Mooney, for the plaintiff in error.

Moore & Craver and W. C. Guenther, for the defendant in error.

¹⁵¹ PRICE, J. The material facts of this case are not seriously in dispute. The first paragraph of the answer makes denial of some of the averments of the petition, but the balance of the answer gives an affirmative statement of what the defendant, the Aetna Insurance Company, claims the real transactions between it, the Stambaugh-Thompson Company and the Connecticut Fire Insurance Company were, preceding the fire.

One V. J. Lamb, on the first day of April, 1904, and for some time prior thereto, had been a local agent for the Connecticut Fire Insurance Company, and was located in the city of Youngstown, Ohio, in which was the store and place of business of the Stambaugh-Thompson Company. Through his agency, said insurance company, on the first day of April, 1904, issued and delivered to the Stambaugh-Thompson Company a policy of insurance in the sum of three thousand five hundred dollars, covering the stock of goods and other merchandise described in the petition. There was other concurrent insurance at ¹⁵² that time of over seventy-five thou-

sand dollars. The premium was thirty dollars and fifteen cents, but was not paid until after the fire. On or about the twenty-ninth day of April, 1904, the authority of Lamb to represent in any respect said insurance company was revoked, and at the time of the fire on the twenty-first day of May, 1904, said Lamb was not the agent of said company, but the Stambaugh-Thompson Company believed that he was, and had no notice or knowledge then of the fact that his agency had been revoked. Prior to the fire, and on that day, said Lamb was the agent in said city of the Aetna Insurance Company, and had authority to fill up blank insurance policies issued by that company, which had been signed by its proper officers and delivered to him, so that the said agent, when he desired, could fill said blanks, and when so filled and the policy countersigned by him, the same would become effective on delivery to the insured without further action on the part of the company. There is no dispute in this court, and there was not much in the trial court, about the following prominent facts: In the forenoon of the twenty-first day of May, 1904, and some time preceding the fire, Lamb met Mr. Vallance, of the Stambaugh-Thompson Company, on the street in Youngstown, not far from the store, and informed Vallance that the Connecticut Fire Insurance Company had communicated to him, Lamb, that it had more insurance in that block than it cared to carry, and that he had transferred it into another company. When asked by Vallance what company he referred to, Lamb replied, the Aetna. Vallance, who was in charge of the insurance affairs of Stambaugh-Thompson Company, expressed his satisfaction with the Aetna, and directed ¹⁵³ Lamb to go to the office in the store and tell Mr. Freed, a bookkeeper there, of the arrangement, and that he should hand over to Lamb the policy issued by the Connecticut Fire Insurance Company and take in its place the policy of the Aetna company, all of which was done. The Aetna policy was delivered and the Connecticut policy surrendered to Mr. Lamb. These policies were for the same amount and on same conditions. After Lamb had taken possession of the Connecticut policy he left the building and when on the street, a very few minutes after leaving the store, he heard the fire-alarm and soon ascertained that a fire had started in the store of the Stambaugh-Thompson Company, which he had so recently left. The fire was in the rear and upper part of the building. During the progress of the con-

flagration Lamb, uncertain as to what course he should pursue, handed the Connecticut policy to Mr. Stambaugh, president of the Stambaugh-Thompson Company, and he retained it, as well as the policy issued by the Aetna company. The insured company, two or three days after the fire, paid the premium on the Connecticut policy for the entire term for which it was issued, and at the same time paid the premium for the Aetna policy. The latter company returned the premium to the insured, but it was again sent to the office of Mr. Lamb, its agent. Proper proofs of loss were made to both companies, and there is no dispute concerning them, or the amount of the loss, but each company declined to pay it, and hence the suit under review.

It is not claimed that the fire had started at the time the policies were exchanged, nor is there any evidence to support such claim if it were made. ¹⁵⁴ Therefore the liability of the insurance company must be determined from its status at that important crisis. It was not intended or understood that both policies should be binding, but that the Aetna should be a substitute for the other policy. Therefore, on the facts narrated, is the Aetna company liable? The answer to this question is to a large extent dependable upon the right of the insured to regard and deal with Lamb as the representative of the Connecticut company. If the revocation of his agency in April preceding the fire was effective as to third persons who were not apprised of such revocation, then the transactions between Lamb and the insured prior to the fire were void, and there was no valid cancellation of the policy issued by that company. The lifting or taking up of such policy on one side and its surrender to him by the insured was of no avail. But the general rule of revocation of agency does not prevail on the facts of this case, because it is undisputed that the Stambaugh-Thompson Company had no notice or knowledge that the agency had been revoked, and having dealt with Lamb in the placing of the Connecticut company policy, on the 1st of April just preceding, it believed he was still its agent at the time the exchange of policies was made. Under such circumstances, and for the purposes of the exchange, the law regarded Lamb as still the representative of that company. This proposition of the law of agency is not contested, but is agreed upon as the rule that should govern this case. It is the rule recognized in *Ish v. Crane*, 8 Ohio St. 520, 13 Ohio St. 574. See,

also, *Springfield F. & M. Ins. Co. v. Davis*, 18 Ky. Law Rep. 654, 37 S. W. 582; *Burlington Ins. Co. v. Threlkeld*, ¹⁵⁵ 60 Ark. 539, 31 S. W. 265; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84, 24 L. ed. 653. There are many other supporting authorities, but as the rule is conceded, we need not cite them.

We are now brought to the question, Was the Connecticut policy canceled prior to the fire? As we have already said, it is agreed upon all hands that both policies were not to be in force, for that would have created additional insurance when such was not the purpose of the parties. It is earnestly urged for plaintiff in error that there was no valid cancellation effected; that at the most, there was but a conditional cancellation, and that statement implies that something had to be done or said by the Connecticut company, after the Stambaugh-Thompson Company surrendered the policy to Lamb, and that as nothing was said or done by the company toward the completion of a cancellation, then in fact and law none was made.

The policy contains the following provision: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that if this policy is canceled by this company giving notice, it shall retain only the pro rata premium."

If the company exercises the right of cancellation, it must give five days' notice thereof, so that the insured may procure other insurance, and until the expiration of the five days the policy is in full ¹⁵⁶ force. On the other hand, it is sufficient if the insured request its cancellation of the company or its agent for that purpose, and with such request delivers the policy to the company or such agent. No agreement for cancellation is necessary. If the company desires to cancel and gives the five days' notice, it can cancel despite the protest of the insured, for his consent is not essential. No meeting of the minds is necessary, and no act on his part is necessary. And if the insured desires a cancellation, he may request it and surrender the policy to the proper party for that purpose:

Train v. Holland Purchase Ins. Co., 62 N. Y. 598, 68 N. Y. 208.

As said by the court of appeals in **Crown Point Iron Co. v. Aetna Ins. Co.**, 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147: "While a method of terminating the insurance upon the motion of the insured is not specified, except that the insured party is to request it, the language of the contract indicates that the subject is within his control and that the terminating act is to be done by him alone, without any concurrent or supplemental act on the part of the company. . . . While it takes two to make a contract, one may end it, if the contract itself so provides."

And again, on page 615, the same court says: "Although the language of the parties is at the 'request' of the insured in one instance, and on 'notice' to the insured in the other, we think that in both it is within the power of the party desiring to end the contract to do so without either consent or action on the part of the other. When the insured surrenders the policy and requests that it be canceled, he can do no more. Unless that ends the contract he is powerless to end it, and the company ¹⁵⁷ while able itself to hang on or let go as it wishes, can hold him against his will."

We have seen in the statement of facts in the case before us, that the surrender of the Connecticut policy and the substitution of the Aetna policy was had in pursuance of an agreement between the insured and Lamb, who, as the insured believed, still represented the Connecticut company. The very act of surrendering one policy and accepting the other in its stead implies both request and direction that the first be canceled. The insured could go no further or do more. What marks may be put on the policy or entries made on the books of the company is a matter of its own. Regarding Lamb as the agent of the Connecticut company, as we must do, because **Stambaugh-Thompson Company** believed him still to be such agent, where is there any conditional cancellation in this case? True, after the fire or near the end of its work, Lamb handed back the Connecticut policy, but that was useless, for, as already stated, the status of the insurance companies, for weal or woe, became unalterably fixed by the starting of the fire, and neither the return of that policy nor the subsequent payment of its premium by the insured changed the relations of the parties.

But another proposition is urged against the liability of the Aetna company. It is stated on page 25 of brief for plaintiff in error in the following language: "If the defendant in error (the Stambaugh-Thompson Company) had the right to reject the unauthorized act (of Lamb), of which there can be no doubt, there was no legal agreement for the cancellation of the Connecticut fire insurance policy prior to the fire. If, in law, ¹⁵⁸ the defendant in error had the right to reject the unauthorized act of Mr. Lamb, the mere fact that the Connecticut Fire Insurance Company was bound and was willing to ratify the unauthorized act of Mr. Lamb, this would not make a valid agreement, for the reason that the contract was not mutual, both parties must be bound or neither." A very plausible argument is constructed on this proposition, and several authorities cited and quoted from to support it, such as *Dodge v. Hopkins*, 14 Wis. 630; *Atlee v. Bartholomew*, 60 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110; *Townsend v. Corning*, 23 Wend. 435; *Mechem on Agency*, and other text-books. On page 24 of the same brief, counsel for plaintiff in error say: "We contend that the defendant in error was not bound by the unauthorized act of Mr. Lamb. The defendant in error had the option, upon discovering that Mr. Lamb acted without authority for the Connecticut Fire Insurance Company, to reject or ratify the unauthorized act of Mr. Lamb, if a ratification of such a contract could be had after the fire."

It may be said that the general rule of law embraced in the quoted statements of counsel is not disputed, but it does not control under the facts of the present case. We must not lose sight of the principle, already stated, and upon which counsel for these contesting parties agree, that the status of the two companies and the insured at the beginning of the fire is to be reckoned with in working out their rights. And it is more than doubtful that a ratification or repudiation of the act of Lamb by the Connecticut Company after the fire could in any way affect its liability. At any rate, there is nothing in the record to show ¹⁵⁹ that said company did repudiate Lamb's acts after the fire. It is quite clear that the insured did not repudiate what had been done, for it insists on holding on to the fruits of the substitution of the Aetna policy. Beyond all cavil, Lamb was the authorized agent of the latter company at the time of the exchange of policies, and it is in no condition to reject or repudiate what Lamb did. Therefore we have no facts in this case upon which to predicate the

propositions and authorities of learned counsel. His quotation from Clark & Skyles on the Law of Agency, 372, is that "the ratification of a contract entered into by a person acting as agent, but without authority so to do, made by a person for whom he assumed to act as principal, cannot validate the contract so as to bind and be in force against the other party without his consent." This is, in substance, the doctrine of the third section of the syllabus in *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110, cited for plaintiff in error. Who is the "other party" without whose consent the ratification is of no avail in the language quoted? Certainly not the Aetna Insurance Company, but rather the Stambaugh-Thompson Company. It has not rejected the acts of Lamb, but consents, if consent can be given, that his acts shall stand, and it is now endeavoring to enforce its rights under the acts of Lamb.

And so with the case of *Dodge v. Hopkins*, 14 Wis. 630, and other authorities cited. In that case a land contract was involved and the following from the syllabus shows what was decided, bearing upon the subject of agency: "Where a contract for the sale of land is not binding upon the owner of the land, because made by a person who ¹⁶⁰ assumed to act as his agent without any authority, it is not binding upon the other party. No subsequent act of the owner in ratification of the contract could make it obligatory upon the other party without his assent. If part of the purchase money was paid to the agent, the owner of the land was at liberty to reject it, and his subsequent acceptance of it, being an act with which the other party was in no way connected, imposed no obligation on the latter until he actually assented to it." This represents the sum and substance of all the authorities cited on the subject we are now discussing, although they are couched in different forms of expression. If we can apply the law so announced in the present case, the Stambaugh-Thompson Company—"the other party" in the legal figure—was not bound by the unauthorized acts of Lamb until it assented thereto. And it is clear here that if assent could be given after the fire, which we need not decide, it has been given and is relied upon. But if the assent could not be given after the fire, it is because that event determined the relative position of the parties, and neither assent or dissent thereafter could alter their rights. The insured could then stand upon the

strength which the law gives to an assumed agency on the part of Lamb upon which the insured relied in good faith.

Hence, the doctrine invoked by plaintiff in error does not give relief.

However, it is said for plaintiff in error, in one branch of its brief, that the defendant in error, by certain acts, clearly indicated its intention to and did refuse to ratify the unauthorized acts of Lamb; and in another branch it is baldly asserted that ¹⁶¹ "the defendant in error could not ratify the unauthorized acts of Lamb after the fire, and therefore there could be no ratification by the defendant in error of the unauthorized act of Lamb." These statements are inconsistent. If the defendant in error could not ratify Lamb's acts after the fire, it would seem true, also, that a refusal or neglect to ratify after the fire would be a vain thing. The peculiar circumstance of the fire following so soon upon the heels of the exchange no doubt tended to confuse the insured—each company claiming to be exempt, and this may account for proofs of loss and payment of premiums to both.

It is further claimed that Lamb, in the transaction of negotiating an exchange of policies, was exercising a double agency, which rendered the transaction void, inasmuch as the insured knew that he was attempting to act as agent for each of the insurance companies. The plaintiff in error states its claim in the language of the court in *Empire State Ins. Co. v. American Central Ins. Co.*, 138 N. Y. 446, 34 N. E. 200, where it is said: "A person who is employed as agent by two principals may not, without their assent, act for both in making a contract between them in a matter where he is invested with a discretion by each, and in which each is entitled to the benefit of his skill and judgment, and a contract so negotiated is void at the option of a nonassenting party." In our case, the agent Lamb was not engaged in making a contract between the two insurance companies—the two principals involved in the rule—nor was there any such contract made, and therefore the discretion, skill and judgment of the agent was not exercised in any contract made by him between two ¹⁶² principals. It is not intimated that in the substitution of the Aetna for the other policy, Lamb was also acting as the agent of the insured, and we must again observe that the authorities cited do not fit the case under review, for the agent did not make a contract between the two principals. He acted severally for each company.

But is the Aetna company in a position to claim the benefit of the rule invoked? Lamb was its agent, and having been let out of the service of the Connecticut company he encouraged an ambition to take some of the latter's business and give it to the former. In getting business away from another company he was acting within the scope of his authority as agent of the Aetna, although he was not instructed to use falsehood or dishonest means to obtain it. Assuming also to represent the Connecticut, as once had been his relation, he accepts a surrender of the latter's policy and substitutes that of the Aetna. If he prevaricated in his course of conduct with the insured, he was the prevaricator of the Aetna company, and we are unable to see how it can evade the consequences of his act.

We find no substantial error in the judgment of the circuit court, and the same is affirmed.

Shauck, C. J., and Crew, Summers and Spear, JJ., concur.

DAVIS, J., Dissenting. This case is a contest between the two insurance companies. Plaintiff below, defendant in error here, is a merely nominal ¹⁶³ party; for it was conceded in the oral argument that if the plaintiff in error should prevail in this action, the Connecticut company would be liable and would pay its proportion of the loss without further contention. Yet the majority opinion is grounded on the proposition that the insured was ignorant of the fact that Lamb was no longer the agent of the Connecticut company, and therefore had the right to elect to treat him as the agent of that company and to hold his acts to be a revocation of that company's contract. I see no reason to controvert that proposition here, but in my opinion it has no application in a controversy between the two insurance companies. And it seems very plain to me that in this case, in which each of the insurance companies is trying to escape liability and put it upon the other, it does not lie in the mouth of the Connecticut company to repudiate Lamb as its agent and in the same breath claim him to be its agent for the purpose of abrogating its contract, an agency which is more than probable that it would have also repudiated if no loss had occurred. Neither could Lamb act as the agent of both companies in a matter in which their interests were, or might become, adverse. In these respects and in several others ably set forth in the brief of counsel for the plaintiff in error, it appears to me that the decision of the

majority runs counter to settled principles of the law; and that it has no justification whatever, unless it be as a punishment to the plaintiff in error for having unwittingly employed an unprincipled man as its agent.

An Agent Whose Authority has been Revoked may continue to bind his principal in his dealings with third persons who have been accustomed to deal with him in his capacity of agent and who have not been notified of the revocation of his appointment and authority: See the note to *Tier v. Lampson*, 82 Am. Dec. 637.

DROWN v. NORTHERN OHIO TRACTION COMPANY.

[76 Ohio St. 234, 81 N. E. 326.]

STREET RAILWAYS—Contributory Negligence.—If a person enters upon a street and drives therein along the track of a street railway company without afterward looking back, or drives along the street until he comes to an obstruction and then turns out upon such track, to avoid the obstruction, without looking back, and the vehicle in which he is riding is struck behind by a car, he is guilty of contributory negligence and cannot recover. (p. 847.)

NEGLIGENCE, CONTRIBUTORY, Right to have Specific Instructions upon.—Where the issue is presented of whether a person injured by a collision with a street-car was not guilty of contributory negligence in driving along the track or turning across it without looking back to see whether any car was approaching, it is not sufficient to instruct the jury that if the motorman could, by the exercise of ordinary care, have seen the team and stopped the car, and that by reason of the failure to do so, the team was injured, plaintiff was entitled to recover, if his driver was free from contributory negligence. The defendant has the right to have the jury more specifically instructed, that if the jury find that both plaintiff and defendant, through their agents, were negligent, and the negligence of both contributed so as to directly cause the injury, the verdict should be for the defendant. (pp. 848, 850.)

NEGLIGENCE CONTRIBUTORY.—The Doctrine of "the Last Chance" is applicable only in exceptional cases, and the prevailing habit of incorporating it in almost every charge to a jury in negligence cases, in connection with, and even as a part of, instructions on the subject of contributory negligence, is misleading and dangerous. (p. 848.)

NEGLIGENCE, CONTRIBUTORY.—The Last Chance Doctrine can be Applied Only where the negligence of the defendant is proximate and that of the plaintiff remote; for if the plaintiff and the defendant are both negligent, and their negligence is concurrent and directly contributes to produce the accident, then the case is one of contributory negligence, pure and simple; but if the plaintiff's negligence merely put him in a place of danger and stopped there, not actively continuing until the moment of the accident, and the plaintiff either knew of the danger, or by the exercise of such diligence as

the law imposes upon him would have known of it, then if the plaintiff's negligence did not concurrently combine with the defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury, and that of the plaintiff is a remote cause. (p. 849.)

Action brought before a justice of the peace and subsequently removed to the court of common pleas by an appeal, to recover damages for injury to a buggy and a pair of horses by an electric car belonging to the defendant. The negligence alleged in the petition was the running of the car at a high and dangerous rate of speed, without a signal or other warning, in violation of a municipal ordinance, and without keeping a lookout for persons driving in the street. The defendant, after denying all negligence, alleged that if the plaintiff was injured, such injury was a direct result of the carelessness of plaintiff and of the person driving his team; that such person carelessly and negligently drove on the track in front of an approaching car without looking therefor or taking any precautions for his safety or that of the team, though the approach of a car could have been seen and heard by the exercise of ordinary care; that the person driving drove upon the track in front of the approaching car, which was so close that it was impossible to stop it before it came in collision with the buggy and team.

The evidence tended to show that the plaintiff owned a span of horses and a top buggy to which they were attached and which were being driven by an agent southerly on Main street, in the city of Akron. The driver then looked behind for an approaching car, but seeing none, did not subsequently look back. On seeing a wagon partly obstructing the street, he drove across the rails of one of the tracks to avoid such wagon, and soon thereafter the buggy was struck by the defendant's car.

The trial court was asked to instruct the jury that "If the jury find from the evidence that the plaintiff, through his agent Hardy, and the defendants were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant," and that "if the jury find that the negligence of both plaintiff's agent and the defendant combined so as to directly cause the injury complained of by plaintiff, then your verdict should be for the defendant." The court refused to charge as so requested, but in its charge

did say to the jury: "I say to you, gentlemen of the jury, that if you find from all the evidence that the motorman who had charge of the car which struck Hardy's team could, by the exercise of ordinary care, have seen the plaintiff and stopped the car, and that by reason of the failure to stop the car, Hardy's team was knocked down and injured, it would be such negligence on the part of the defendant as would enable the plaintiff to recover, provided Hardy was free from contributory negligence on his part; or if the motorman saw Hardy's team on the track, or by the exercise of ordinary care could have seen it in time to stop the car, but did not, and purposely, willfully and wantonly ran into it, then defendant would be guilty of negligence, and the plaintiff would be entitled to recover under such circumstances, even if plaintiff's agent was guilty of contributory negligence in being on the track in front of the car at the time of the injury"; also "that one who is injured by the mere negligence of another cannot recover any compensation for his injury, if, by his own negligence, he contributed to produce the injury of which he complains, so that, but for his or his agent's concurring or co-operating fault, the injury would not have happened to him, except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's or his agent's, negligence, or by the exercise of ordinary care could have become aware of such negligence, failed to use a proper degree of care to avoid the consequences of such negligence"; further, "that notwithstanding the jury may find that the plaintiff or his agent was guilty of negligence, and that such negligence contributed to the injury of which he complains, yet, still, if the agents of the defendant were aware of such negligence in time, by the use of ordinary care and prudence to have avoided the effect of such negligence on Hardy's part, but did not do so, then such negligence on his part is not such contributory negligence as to constitute a defense to this action"; "that if Hardy was on this track driving south, and you find he was negligent in being on it as he was, his failure to look, or failure to watch, to avoid injury, if he was negligent, that that would not prevent him from recovering in this suit, if the motorman of the car, after discovering him in that position, could have, by the use of reasonable and ordinary care on his part, avoided the injury by stopping the car."

The defendant excepted to the charge and every part thereof and also to the refusal to give the charges requested by it. A verdict was returned in favor of the plaintiff and judgment rendered thereon, and the defendant's motion for a new trial was overruled. The circuit court, on petition, reversed the judgment of the court of common pleas and remanded the cause to that court. The plaintiff in error sought to have the judgment of the circuit court reversed and that of the common pleas affirmed.

G. M. Anderson and A. J. Wilhelm, for the plaintiff in error.

Rogers, Rowley & Rockwell, for the defendant in error.

²⁴⁵ DAVIS, J. Under the issues in this case, evidence was introduced tending to prove that the plaintiff's agent was guilty of negligence directly contributing to the injury to plaintiff's property. If the driver of the plaintiff's team, immediately upon entering Main street, and without afterward looking to the north as he admits, drove southward upon the track until the car coming from the north overtook and collided with the buggy, he was negligent; because the street was open and unobstructed for from two hundred to two hundred and fifty feet from the point at which he entered upon it, and it was not necessary for him to go upon the street railway track, and because, the night being dark, the unnecessarily put himself in a place of obvious danger and continued thereon until the moment of the accident, without looking out for an approaching car or doing anything whatever to avoid injury, apparently risking his life and the property of his principal upon the presumption that the defendant's employes would make no mistake nor be guilty of any negligence. If, on the other hand, he drove along the street until he ²⁴⁶ came to the obstruction and then turned out upon the track to go around it without again looking, as his own testimony shows that he did not, and was then almost in the same instant struck by the car, he was negligent. Upon either hypothesis, assuming that the defendant was negligent in not keeping a proper lookout, or was otherwise not exercising ordinary care to prevent collision with persons lawfully on its track, the plaintiff could not recover, if it should appear in the case that the negligence of both is contemporaneous and continuing until after the moment of the accident,

because in such case the negligence of each is a direct cause of the injury without which it would not have occurred, rendering it impracticable in all such instances, if not impossible, to apportion the responsibility and the damages. Suppose, for example, that not only the buggy and horses had been injured but the defendant's car also, by what standard could the extent of liability of either party be determined? *Timmons v. Central Ohio R. R. Co.*, 6 Ohio St. 105; *Village of Conneaut v. Naef*, 54 Ohio St. 529, 44 N. E. 236. In short, there can be no recovery in such a case unless the whole doctrine of contributory negligence, a doctrine founded in reason and justice, should be abolished.

Under these circumstances, therefore, it was not sufficient to say to the jury that if they should find that the motorman who had charge of the car which struck the team could by the exercise of ordinary care have seen the team and could have stopped the car, and that by reason of the failure to do so the team was injured, it would be such negligence by the defendant as would entitle the ²⁴⁷ plaintiff to recover, provided that plaintiff's driver was "free from contributory negligence." The defendant had the right to have the jury specifically instructed, as it requested, that if the jury should find from the evidence that both the plaintiff and the defendant, through their agents, were negligent, and that the negligence of both combined so as to directly cause the injury complained of, then the verdict should be for the defendant. The court refused to so instruct the jury, and the circuit court correctly held that the refusal to so charge was erroneous.

The error in refusing the defendant's request to charge was extended and made much more prejudicial when the court, after giving instructions as to contributory negligence by the plaintiff in very general terms, proceeded to impress upon the jury, by repetition and with some emphasis, the doctrine known as "the last chance." This doctrine is logically irreconcilable with the doctrine of contributory negligence, and accordingly it has been vigorously criticised and warmly defended. Probably, as in many such controversies, the truth lies in middle ground; but it is certain that the rule is applicable only in exceptional cases, and the prevalent habit of incorporating it in almost every charge to the jury in negligence cases, in connection with, and often as a part of, instructions upon the subject of contributory negligence, is misleading and dangerous.

This confusion seems to arise either from misapprehension of the law or a want of definite thinking. The doctrine of the "last chance" has been clearly defined by a well-known text-writer as follows: "Although a person comes upon the ²⁴⁸ track negligently, yet if the servants of the railway company, *after they see* his danger, can avoid injuring him, they are bound to do so. And, according to the better view with reference to injuries to travelers at highway crossings—as distinguished from injuries to *trespassers* and *bare licensees* upon railway tracks at places where they have no legal right to be—the servants of the railway company are bound to keep a vigilant lookout in front of advancing engines or trains, to the end of discovering persons exposed to danger on highway crossings; and the railway company will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it could avoid injury to them": 2 Thompson on Negligence, sec. 1629. The italics are the author's. Now, it must be apparent upon even a slight analysis of this rule that it can be applied only in cases where the negligence of the defendant is proximate and that of the plaintiff remote; for if the plaintiff and the defendant both be negligent and the negligence of both be concurrent and directly contributing to produce the accident, then the case is one of contributory negligence, pure and simple. But if the plaintiff's negligence merely put him in the place of danger and stopped there, not actively continuing until the moment of the accident, and the defendant either knew of his danger, or by the exercise of such diligence as the law imposes on him would have known it, then, if the plaintiff's negligence did not concurrently combine with defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury and that of the plaintiff ²⁴⁹ is a remote cause. This is all there is of the so-called doctrine of "the last clear chance." A good illustration is found in the case of Cincinnati R. R. Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674. Kassen walked through the rear car of the train on which he was a passenger to the rear platform from which he stepped off or fell off upon the track, where he lay for about two hours, when he was run over by another train. It was held that, although Kassen may have been negligent in going upon the rear platform and stepping or falling off, yet since the railroad company knew of his peril and had ample

time to remove him or to notify the trainmen on the later train, its negligence in not doing so was the proximate cause of Kassen's death, and the negligence of Kassen was remote. In that case the proximate cause and the remote cause were so clearly distinguishable, and it is so very evident from the opinion and the syllabus that this distinction was the real ground of the judgment of the court, that it is somewhat surprising that the doctrine of last chance as stated in that case should have been so often misinterpreted as a qualification of the doctrine of contributory negligence.

It is clear, then, that the last chance rule should not be given as a hit-or-miss rule in every case involving negligence. It should be given with discrimination. Since the plaintiff can recover only upon the allegations of his petition, if there is no charge in the petition that the defendant after having notice of the plaintiff's peril could have avoided the injury to plaintiff and there is no testimony to support such charge, the giving of such a charge would be erroneous. There is ²⁵⁰ no such allegation in the petition in this case. But further, there is testimony tending to prove that the plaintiff's team was driven upon the street railway track in the nighttime, ahead of the car, and that it continued on the track for a distance of two hundred and fifty feet until struck by the car, without taking any precaution to avoid accident. Assuming that the defendant was negligent in not seeing the buggy on the track and in not avoiding the accident, yet the plaintiff's negligence was continuous, and was concurrent at the very moment of the collision. It proximately contributed to the collision, for without it the collision would not have occurred. There was no new act of negligence by the defendant, which was independent of the concurrent negligence and which made the latter remote. Therefore, there was no place in the case for the doctrine of "the last clear chance."

There is a case, which was decided in the sixth circuit, which will illustrate our views, and a reference to it may save some further discussion. It is the case of *Lake Shore etc. Ry. Co. v. Callahan*, 2 Ohio C. C., N. S., 326, 15 Ohio C. D. 115. A railroad section-man, in obedience in an order by his foreman, started to walk along the track with his back to a locomotive two or three hundred feet away, but without observing whether the engine was standing still or running backward, and he walked along the track for seventy-five feet without paying any further attention to the engine, which was in fact

backing toward him, and was struck by it and injured. The court held that it was a case of concurrent negligence, continuing to the moment ²⁵¹ of the injury, that the doctrine of "the last chance" did not apply, and that plaintiff was guilty of contributory negligence.

Similar views were expressed by the New York court of appeals in *Rider v. Syracuse R. T. Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125, per O'Brien, J., as follows: "The contributory negligence of the injured party cannot be taken from the jury except in cases where it is clear that there was some new act of negligence on the part of a defendant that was the proximate cause of the injury. The negligence of the defendant, if any. It is impossible to separate that part the defendant, if any. It is impossible to separate that part of the transaction which took place after the first contact of the car with the vehicle from what took place before. It was all one transaction, and to attempt to divide it into fragments and impute one part of it to the negligence of both parties and another part to the defendant's negligence alone would, as it seems to us, entirely subvert the law of contributory negligence as applied to accidents of this character. If the theory upon which this case was tried and submitted is to be sanctioned, it must, we think, follow that in every case based upon such an accident, the result must turn not upon the general rule as stated, but upon the exception; or, in other words, the inquiry must be not whether the injured party was negligent, but whether it was reasonably possible for the defendant to have avoided the accident."

We do not feel willing to close this opinion without reference to *Pittsburg etc. Ry. Co. v. Krichbaum's Admr.*, 24 Ohio, St. 119. While the whole of the court's opinion, delivered by ²⁵² McIlvaine, J., is pertinent, we quote only the following: "Neither of these instructions, however, indicated the rule by which the jury should be governed, in case they found the injury to have resulted from combined causes, to wit. the co-operation of negligent conduct on the part of both the defendant and the deceased. With regard to the rule in such case, the court gave to the jury two propositions, as follows: 'It matters not how careless the servants of the defendant may have been, the plaintiff ought not to recover, if the deceased or his father could have avoided the collision by the exercise of care, diligence, and prudence. On the other hand, it matters not how careless the deceased and his father may

have been, if the persons running the train could, by the exercise of ordinary care, prudence, and diligence, have avoided the collision, and did not, then the plaintiff ought to recover.' The first proposition was quite as favorable to the defendant as it should have been, but the latter was to its prejudice and is wholly indefensible."

The judgment of the circuit court is affirmed.

Shauck, C. J., and Price, Crew and Summers JJ., concur.

A Person About to Cross the Track of a street railway is not under a duty to observe the same degree of care and watchfulness as when attempting to cross a steam railroad, and hence cannot, as a matter of law, be adjudged guilty of contributory negligence because he does not stop, look and listen: *Marden v. Portsmouth etc. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476. But see *Hornstein v. United Railways Co.*, 195 Mo. 440, 113 Am. St. Rep. 693.

A Motorman has the Right to Assume that persons approaching or near the track will not recklessly expose themselves to danger by attempting to cross the track in front of his car: *Butler v. Rockland etc. St. Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267.

CITY OF MANSFIELD v. BRISTOR.

[76 Ohio St. 270, 81 N. E. 631.]

MUNICIPAL CORPORATIONS—Nuisances, Liability for.—A city is liable for damages resulting from the maintaining of a nuisance through its failure to perform its duty to control and supervise its streets. and keep them open and in repair and free from nuisances. (p. 855.)

MUNICIPAL CORPORATIONS—Streets and Sewers.—The construction of a sewer in the streets is an authorized use thereof. (p. 855.)

MUNICIPAL CORPORATIONS—Streets—Power of to Grant Citizens the Right to Maintain Sewers Therein.—A municipal corporation, by virtue of its general control over public streets, may grant permission to a lot owner to construct a private sewer therein, but cannot authorize him thereby to maintain a nuisance. (p. 855.)

MUNICIPAL CORPORATIONS—Nuisance, Liability for not Abating.—A municipal corporation is liable for damages in not abating a nuisance on land in its possession and under its control, and also where such nuisance consists of a private sewer maintained in one of its public streets by its permission. (p. 855.)

MUNICIPAL CORPORATIONS, Watercourse, When not Liable for Failure to Exercise Control Over.—A municipal corporation given by law control of a watercourse is not liable for not abating a nuisance therein. Whatever authority is given the city is merely a

delegation of the police power, and for a failure to exercise that power a municipality is not answerable to a private action. (p. 856.)

NUISANCE, Joint Liability for, When does not Exist.—A riparian proprietor who has been injured by the pollution of a stream by the acts of several may not, in a suit against one, recover against him for the entire injury, excepting to the extent that the jury may mitigate the amount of recovery by considering the evidence tending to show the extent to which the acts of others have contributed. (p. 856.)

Action against the city of Mansfield to recover damages for the loss of health and comfort caused by the pollution of Ritter's Run, a natural watercourse flowing through the rear of plaintiff's premises in that city. Verdict in favor of the plaintiff, assessing her damages at two thousand one hundred and sixty-eight dollars, and the judgment entered upon such verdict was affirmed upon appeal to the circuit court.

L. H. Beam and G. M. Cummings, city solicitors, for the plaintiff in error.

W. H. Bowers, for the defendant in error.

²⁷⁴ SUMMERS, J. Ritter's Run in the days of the Indian was a limpid stream, but the natural and inevitable result of the coming of the white man with his dirty city was that it degenerated into a foul drain and became a nuisance when it was made the outlet for sewers. But these consequences do not warrant an attempt to arrest the march of civilization, or, as ²⁷⁵ it is beautifully expressed by Lord Justice James, in *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. Cas. 705: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes."

The principal source of pollution in Ritter's Run were five drains or sewers, a cesspool belonging to riparian proprietors and refuse thrown or permitted by them to find its way into the stream. Of the sewers, four were private sewers or drains, one laid in private property and the others in the streets of the city by permission from the city, and only one was constructed by the city, and that was not constructed as a sewer but consisted of two lines of eight-inch pipe that had been laid with open joints, one line on each side of a street, for

the purpose of drainage and as part of the improvement of the street.

It does not appear that the city authorized any of these drains to be used as sewers, but that they were so used and that Ritter's Run became so foul as to occasion material discomfort to the plaintiff does appear. The city had knowledge that sewage was being deposited in the stream through these drains, and that this matter in connection or combination with other matters in the stream created a nuisance. There was evidence that the plaintiff was sick for a time, but whether from the ills that flesh is heir to or from the condition of the stream is left wholly to conjecture. There is no evidence²⁷⁶ of depreciation in the value of plaintiff's property or in its rental value, and it appears that she all the while continued there to reside, so that the amount of the verdict raises a doubt that the jury had any just conception of the measure of the defendant's liability and leads to an examination of the instructions that were given them for their guidance. The court having charged in substance that the owner of land over which a stream of water flows has a right that it should continue to flow over his premises in the quantity, quality and manner in which it is accustomed to flow by nature, subject to the right of upper land owners, over whose land it also flows, to make a reasonable use of the stream, and that this right is a property right, and that the city would have a right to use this stream for sewerage purposes, providing it could do so without material injury to the lot owners below, then instructed them, in effect, that the city is given control of its streets, and, under section 203 of the new municipal code (Revised Statutes, section 1536-857), of sewers, drains, ditches and watercourses, and charged with the duty of keeping its streets open and free from nuisances, and that it would be liable to the plaintiff in damages for the injuries she suffered in health and comfort from the nuisance created in the stream, if they found one was so created, whether it was created by the city or by others, if, after knowledge that they were creating a nuisance, it neglected to prevent them from so doing; and further that it was not essential to liability on the part of the city that it should have caused the entire injury, and that it was no defense that others in like manner had contributed to it, and that they²⁷⁷ might consider any evidence offered by the defendant tending to prove such fact in mitigation of damages only and for no other purpose.

The care, supervision and control of the public streets is given to the city, and it is made its duty to cause them to be kept open and in repair, and free from nuisance, and the city is liable for damages resulting from its negligence in the discharge of this duty: *City of Zanesville v. Fannan*, 53 Ohio St. 605, 53 Am. St. Rep. 664, 42 N. E. 703. The construction of a public sewer in the streets is an authorized use of the streets (*City of Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73), and, under the power given it over its streets, a city may grant permission to a lot owner to lay a private sewer in a public street, but neither at common law nor under the statute could it authorize a nuisance, and at common law as well as under the statute it would be liable for damages resulting from its negligence in not abating a nuisance on land in its possession and under its control. In *Laugher v. Pointer*, 5 Barn. & C. 547, Mr. Justice Littledale says: "The rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others." This statement of the rule was ²⁷⁸ approved in *Quarman v. Burnett*, 6 Mees. & W. 499; and in *Rich. v. Basterfield*, 4 Barn. & C. 783, 2 Car. & K. 257, 16 L. J. C. P. 273, 11 Jur. 696, and by Sir G. Jessel, M. R., in *White v. Jameson*, L. R. 18 Eq. Cas. 303, 22 Week. Rep. 761, where he says: "Now, here Jameson was in possession of the property, but he did not demise it to Proffitt; he merely granted to him a revocable license to burn bricks upon it. Consequently he has brought Proffitt on his land and allowed him to commit a nuisance, and for this I hold he is liable to be sued in equity as well as at law."

The court in effect charged the jury that the city was given control of this watercourse by section 203 of the new municipal code, and that having control of the watercourse it was its duty to prevent it from being made a nuisance, and in the event a nuisance was created therein, to abate it after it had notice of the fact. This clearly was prejudicial error. That section provides that the street commissioner, under the

direction of council, shall supervise the improvement and repair of sewers, drains, ditches, streams and watercourses. The plaintiff's injuries were not occasioned by any improvement or repair of the watercourse, and moreover the statute applies only to villages. The stream is private property, and as long as it so remains, the only authority over it that may be delegated by the legislature to the city is in the exercise of the police power, and for a failure to exercise that power, or for a failure of the city's agents to enforce regulations prescribed in the exercise of the power, the city would not be liable.

In its charge the court also said: "To hold the city liable it is not necessary that it should have produced or caused the entire injury; that others ²⁷⁹ may have contributed to the injury in the same way would not be a defense, for our own circuit court has said in the language following: 'Neither is it any defense to an action for a nuisance resulting from the pollution of a stream of water or otherwise, that other persons are also contributing to the injury in the same way with the defendant; the fact that others are committing a wrongful act is no excuse for other's wrong. It may in a proper case be shown in mitigation of damages, but not to defeat the action.' And I say to you that you may consider any such evidence offered by the defendant tending, as it claims, to show that other persons contributed to the injury complained of in the same way with the defendant, in mitigation of damages only, in case you find for the plaintiff, and for no other purpose."

This statement of the law is found in the opinion of the circuit court in the case of *City of Mansfield v. Hunt*, 19 Ohio C. C. 488, and is a quotation from *Wood on Nuisances*. But if the learned author and the circuit court are to be understood, as they were by the trial court, as declaring the law to be that a riparian proprietor, who has been injured by the pollution of a stream by the acts of several, may in a suit against one recover against him for the entire injury, excepting to the extent that the jury may mitigate the amount of the recovery by the consideration of evidence tending to prove the extent to which the acts of others contributed, then it is to be observed that the quotation is not a correct statement of the law, and is not supported by the cases cited by *Wood* or by the cases and authorities cited in the opinion of the circuit court.

²⁸⁰ Crossley & Sons, Limited, v. Lightowler, L. R. 3 Eq. Cas. 279, was a suit to restrain the defendants from suffering the foul water from their dye works to flow into or foul the water of the stream, or from otherwise preventing or interfering with the plaintiffs having the use or enjoyment of the water of the brook in its natural state, and Vice-Chancellor Wood, upon the authority of *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642, ruled that "It is no answer to a plaintiff complaining of a private nuisance to say that a great many other persons are committing the same sort of nuisance," and on appeal (L. R. 2 Ch. App. Cas. 478), the ruling was approved. And in *Attorney General v. Leeds, Corporation*, L. R. 5 Ch. App. Cas. 583, it is held that "though the river Aire was polluted before it received the drainage of Leeds, the land owners on the banks were entitled to restrain the further pollution." To the same effect are the other cases and authorities cited and in none of them is the view suggested taken.

It will be observed that all but one of the cases cited were suits for injunction against several defendants, and not only was it not ruled in any of them that all of the damages might be recovered in one action or from one defendant, but the question was not even raised. And in *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419, and in *Warren v. Parkhurst*, 45 Misc. Rep. 466, 92 N. Y. Supp. 725, one of the grounds assigned for entertaining jurisdiction to enjoin is that there is no adequate remedy at law, because of the difficulty in proving the extent to which each party had contributed to the injury.

In *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566, it is held that "where different parties pollute a stream by ²⁸¹ the discharge of sewage therein, each in his own premises, and each acting separately and independently of the others, one of the number is not liable for all of the injury suffered by another, because of the nuisance they created; each is liable only to the extent of the wrong committed by him." In the opinion Miller, J., says: "The fact that it is difficult to separate the injury done by each one from the others furnishes no reason for holding that one tort-feasor should be liable for the acts of others with whom he is not acting in concert." He also criticises Wood on Nuisances, section 831, cited as authority for the contention that one who contributes to the production of the nuisance is chargeable with all the

damages, and he reviews the cases cited and says they do not sustain such a principle.

Twelve years later, in 1898, in *Miller v. Highland Ditch Co.*, 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550, it was held: "Where debris is deposited upon the lands of the plaintiff by means of different ditches constructed and operated by several defendants, between whom there was no concert of action, a joint action may be maintained to enjoin them all from continuing the wrong, but a joint judgment for damages in such action is erroneous, and will be reversed."

The rule is thus stated in 1 Cooley on Torts, 244, 246 (third edition): "All who actively participate in any manner in the commission of a tort, or who command, direct, encourage, aid or abet its commission, are jointly and severally liable therefor." And again: "In respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive rule can be formulated which harmonizes ²⁸² all the authorities. The authorities are, perhaps, not agreed beyond this, that where two or more owe to another a common duty, and by a common neglect of that duty such other person is injured, then there is a joint tort with joint and several liability."

The case of *Swain v. Tennessee Copper Co.*, 111 Tenn. 430, 78 S. W. 93, received very careful consideration. Very great interests were involved, as will appear from the statement of facts in the subsequent case of *Madison v. Ducktown Sulphur etc. Co., Limited*, 113 Tenn. 331, 83 S. W. 658. In the former case a great many cases are examined, and it is there ruled that: "Where two distinct corporations in proximity to each other operate their respective and separate plants for reducing and converting copper ores into metal ingots or commercial copper, from each of which are emitted immense volumes of noxious, foul, and poisonous smoke and gases, which afterward indistinguishably mingle, commingle, and intermingle into clouds of noxious, deadly, and poisonous vapors, creating an actionable nuisance, but there is no common ownership or operation of the plants, no community of interest, nor common design, purpose, concert, or joint action, a suit by an adjoining or adjacent property owner against them jointly for damages caused by their wrongful acts so separately committed is not maintainable." Also that each corporation was liable only for its proportion of the damages. To the same effect is *Bowman v. Humphrey, Jr.*, 124 Iowa, 744, 100 N. W.

854. And in *Watson v. Colusa-Parrott Mining etc. Co.*, 31 Mont. 513, 79 Pac. 14, it is held that "Where a nuisance arises from the individual acts ²⁸³ of different mining and reduction companies, which have discharged deleterious and poisonous matter into the waters of a creek, and the injury is in no sense a joint one, each company is liable to the person injured for the damage caused by its own wrongful acts, and not for that caused by the acts of others, regardless of the difficulty of determining what part of the damage is occasioned by the acts of each." In *Martinowsky v. City of Hannibal*, 35 Mo. App. 70, it is held that, "Where a waterway is made the receptacle of masses of filth and offensive substances thrown into it by a number of persons at various points along its course, so that a nuisance is created to the injury of an adjacent resident, such injured person cannot maintain an action against all the contributors jointly, but may sue each of them separately, and can then recover in each case only for the proportionate amount of injury caused by the acts of the defendant therein. Nor can a defendant in any one of such cases set up a defense on the ground that the nuisance was the combined effect of all the acts done by himself and others." And in *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451, it is held that, "Where lands are unlawfully flooded with surface water, as the result of the joint act of several parties, each may be sued for the entire damage. But where the damage is the result of the acts of several, acting independently of each other, each is liable for his proportion only."

Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566, is cited as the leading case in support of the rule that the parties who merely contribute to the pollution of a stream are not jointly liable, but evidently it is based upon *Little Schuylkill Nav. ²⁸⁴ etc. Co. v. Richards' Admr.*, 57 Pa. 142, 98 Am. Dec. 209, which may be characterized as the original, if not the leading, case. What the case was as well as the reasoning upon which the conclusion was reached will appear from the following portions of the opinion by Agnew, J.: "The plaintiff's intestate was the owner of a dam and water power upon the Little Schuylkill river. In process of time, from 1851 to 1858, the basin of the dam became filled with the coal-dirt, washed down by the stream from the mines above, of several owners, upon Little Schuylkill, Panther creek and other tributaries. They were separate collieries, worked independently of each other. The plaintiff seeks to charge the defendants

below with the whole injury caused by the filling up of his basin. The substance of the charge and answers to points was, that if at the time the defendants were engaged in throwing the coal-dirt into the river, about ten miles above the dam, the same thing was being done at the other collieries, and the defendants knew of this, they were liable for the combined result of all the series of deposits of dirt from the mines above from 1851 to 1858." "The doctrine of the learned judge is somewhat novel, though the case itself is new; but, if correct, is well calculated to alarm all riparian owners, who may find themselves, by a slight negligence, overwhelmed by others in gigantic ruin.

"It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal-dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal-dirt, he who threw in the ²⁸⁵ coal-dirt, and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream—this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate, and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterward became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions. True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts

of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does ²⁸⁶ him, he may therefore recover from that one all the injury that others do.

“This is bad logic and hard law. Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent. These principles are fully sustained by the following cases: *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Heall*, 2 Vt. 9, 19 Am. Dec. 690; *Van Steenburgh v. Tobias*, 17 Wend. 562, 31 Am. Dec. 310; *Buddington v. Shearer*, 20 Pick. 477; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479. These were cases where the dogs of several owners united in killing sheep, and where the cattle of different owners broke into an inclosure and united in the damage. The concert and united action of the dogs and cattle were held to create no joint liability of their owners, notwithstanding the difficulty of determining the several injury done by the animals of each.”

In *Chicago etc. Ry. Co. v. Hoag*, 90 Ill. 339, the court refused to charge to the effect that if the jury found the damages to plaintiff's property was the combined result of the acts of the defendant and another, that then the plaintiff could not recover against the defendant for the damage occasioned by the acts of the other party; and that if the jury could not determine what part or portion, if any damage, was occasioned by the defendant's acts, then in no event ²⁸⁷ could they find for the plaintiff more than nominal damages. In the opinion, Sheldon, J., says: “The first clause of the instruction is well enough, but the last one is objectionable, as liable to mislead the jury to the extent that unless they could determine to a certainty the extent of damages from each of these sources, they could find only nominal damages for the plaintiff. The evidence justified the belief that the water came mainly from the tank, and the plaintiff was entitled to recover for all damages from that source; and if they could not separate and distinguish between the several amounts of the damage caused by the water from the tank and the surface water re-

spectively, they should have been left at liberty to estimate as best they might, from the evidence, how much of the whole damage was occasioned by the water from the tank."

And in *Babbitt v. Safety Fund Nat. Bank*, 169 Mass. 361, 47 N. E. 1018, where the trial court refused to instruct the jury that it was necessary for the plaintiff to show, in order to recover damages of the defendant, precisely what part of the damage was caused by the negligence and unlawful act of the defendant, and if the facts did not disclose what part of the whole damages was caused by the defendant's negligent act, there could be no recovery, and did charge "if you find there is evidence of such a discharge, and that the defendant contributed by its acts to the increase of the volume of water and its discharge upon the plaintiff's land, then the plaintiff would be entitled to recover the precise amount of damage caused by the defendant's act. The plaintiff would not be entitled to recover from the defendant what damage was ²⁸⁸ caused to it by the acts of the city, for the fact that sewers passed through that street and discharged its sewage in such a way as to fill up the stream." And it was held that if there was any inaccuracy in any of the instructions, it did the defendant no harm.

The view that each person contributing to the fouling of a stream is liable only for the damages caused by his own acts is vigorously combatted by Kay, J., in *Blair and Sumner v. Deakin*, 57 L. T., N. S., 526.

In *Boyd v. Watt*, 27 Ohio St. 259, it is ruled that "Where the damages resulting arise from incapacity from business and loss of estate, caused by such habitual intoxication, and it becomes impossible to separate the damages caused by others from those caused by the defendant, he is liable for all such damages, if the natural and probable consequences of his illegal acts are to cause such injury." But that case was upon the interpretation of a statute, and the conclusion reached may be based upon the legislative intent, and is not, therefore, binding authority in a case controlled by the general principles of law.

In *Sadler v. Great Western Ry. Co.*, [1895] 2 Q. B. 688, in the court of appeals, the case was this: The plaintiff, a dealer in cycles, brought an action against two railway companies which had parcel offices adjoining his shop on opposite sides alleging that each company caused carts to stand on the highway in front of its office for an unreasonable length of time, and that these combined acts prevented all access to his shop

by vehicle or cycle, and caused him special inconvenience, and loss of trade. He claimed damages and an injunction. ²⁸⁹ One of the companies obtained an order in chambers staying the action unless the claim was maintained by striking out the name of the other company as a defendant, and it was held that the order was right, for that the two companies were separate tort-feasors, and could not be joined as codefendants in an action for damages. Smith, L. J., said: "He was trying to sue as codefendants two independent, separate alleged tort-feasors, neither of whom had any control or power over the acts of the other tort-feasor. He was trying to sue them jointly in one action. . . . In my opinion, these two torts, if they are torts, are independent torts by the different companies, although, as I have already stated, the acts of each company can be taken into account in considering the acts of one company and deciding whether they amount to a nuisance or not. The acts of the other company can be taken into account because it may be that the one company ought not to be doing what it was when the other company was doing what it did. But that does not make these two causes of action a joint cause of action or give any right to join one company with the other in one action." Rigby, L. J., dissented, but in *Sadler v. Great Western Ry. Co.*, [1896] App. Cas. 450, in the house of lords, the order was affirmed. Lord Halsbury, L. C., said: "I really think this case is too plain for argument, notwithstanding the period it has lasted."

Pollock on Torts, second edition, 356, is cited in *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911. That edition is not at hand, but in the seventh edition, 406, it is said: "A cause of action for nuisance may be created by independent acts of different ²⁹⁰ persons, though the acts of one only of those persons would not amount to a nuisance." "Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience; but if a hundred do so that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any person among the hundred to say that what he does causes of itself no damage to the complainant." And then the learned author adds: "But this does not mean that a plaintiff may make two or more independent wrongdoers codefendants in a single action for damages whatever may be the rule where only an injunction is claimed." And he cites as authority for the statement the two cases just noticed.

The cases have been noticed at such great length because in the recent case of *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879, it is said: "A distinction, however, is recognized between such acts which are wrongful only because injurious to individual rights and those which combine and constitute a public nuisance." And it was there ruled that "one who creates a public nuisance is responsible to individuals especially damaged, not only for the actual loss he alone has occasioned them, but also for the damages caused by similar acts of third persons which independently concur in causing the injury complained of."

The reason given for the distinction is thus stated: "In the former class of cases each separate wrongdoer is chargeable with his own acts alone, in the absence of a joint purpose among the participants; in the latter, each may be answerable in ²⁹¹ a joint and severable action, not only for what he himself does, but likewise for the acts of those who, with him, violate public, as well as private rights. If a party deliberately places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful act of others, violates an express statute and creates a public nuisance, he is not in a position to assert that he should be held responsible to individuals specially damaged for only the actual loss he alone has occasioned them. He must have anticipated the natural and probable consequences of his acts, namely, the violation of a public right; and the public interest requires he shall, if need be, even in a civil action, bear the full burden of the wrong he has assisted in inflicting. Nor is it material that his act of itself, and without reference to the co-operation of others, would create a public nuisance. He must be deemed to know in a case such as the present, that, if this wrong combines with similar acts of third parties, the result will be to intensify the public and private injury. The welfare of the community demands that he who thus intentionally and aggressively assists either in creating or maintaining a public nuisance in defiance of positive enactments shall answer in civil damages for all injurious consequences proximately resulting therefrom to private individuals who bring themselves within the requirements of the law."

The cases cited as supporting this view are: *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676. 26 N. E. 911; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *City of Val-*

paraiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909. The latter case is based upon the first and need ²⁹² not be noticed. Simmons v. Everson, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911, is this: Three adjoining stores—in fact, one building—but each store belonging to a separate person, were destroyed by fire, leaving the front wall standing and leaning toward the street until it afterward fell into the street and killed the plaintiff's intestate. The entire wall fell, but no part of the material of the wall or that part of the wall in front of one of the owners touched the party killed, but it was held that the three owners were jointly and severally liable. Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566, was urged against the joint liability, but Follett, C. J., said: "The case at bar does not belong to the class of actions arising out of the acts or omissions which are simply negligent, and while the defendants did not intend by their several acts to commit the injury, their conduct created a public nuisance which is an indictable misdemeanor under the statutes of this state and at common law."

"Persons who by their several acts or omissions maintain a public or common nuisance, are jointly and severally liable for such damages as are the direct, immediate and probable consequence of it." And Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603; Slater v. Mersereau, 64 N. Y. 138; Timlin v. Standard Oil Co., 54 Hun, 44, and Klauder v. McGrath, 35 Pa. 128, 78 Am. Dec. 329, are cited in support of the ruling. With all due respect it may be said that the neglect of the several owners did not cause the wall to fall. If the wall was owned jointly, or if the injury resulted from the concurring negligence of the several owners, then it was the duty of each to abate the nuisance, and in consequence of the neglect of each to perform the common duty ²⁹³ the plaintiff was injured, and so they were jointly and severally liable. The reason for a joint liability in such cases is thus stated by Strong, J., in Klauder v. McGrath, 35 Pa. 128, 78 Am. Dec. 329, which was an action against two persons to recover for damages from the falling of a party-wall: "The maintenance of an insecure party-wall was a tort in which they were both participants. The act was single, and it was the occasion of the injury to the plaintiff. It is difficult, therefore, to see why both were not liable, and liable jointly. The case is not to be confounded with actions of trespass for separate acts done by two or more defendants. There, if there has been no concert, no common

intent, there is no joint liability. Here, the keeping of the wall safe was a common duty, and a failure to do so was a common neglect. The rule often recognized is, that when an injury has resulted from the concurring negligence of several persons, they are jointly responsible." In *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, the lessor and lessee of premises were held jointly and severally liable for injuries sustained by a fall into a coal-hole in front of the premises, and in the opinion, Earl, J., says: "Each one of several persons who continue a nuisance is responsible for it, and he may, as in all cases of wrong, be sued alone or with the other wrongdoers." It will be seen that the ground for a liability assigned here is in fact the same as that in the case just preceding—that is, negligence in not abating a nuisance, and because of the neglect of a common duty the defendants were jointly and severally liable.

Slater v. Mersereau, 64 N. Y. 138, is a case in which by reason of the negligence of separate contractors in the construction of a building ²⁹⁴ water from their different parts of the building found its way into the cellar and there united and found its way through the walls onto an adjoining property where it did injury, and it was there held: "Where separate and independent acts of negligence of two parties are the direct cause of a single injury to the third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this, although his act alone might not have caused the entire injury, and although without fault on his part the same damage would have resulted from the act of the other." The opinion is by Miller, J., the same judge who wrote the opinion in *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566, and in the latter case he says the former "was a case where the separate and independent acts of negligence of two parties was the cause of a single injury to a third person, and as was said in the opinion, was somewhat analogous to a case where the injury was caused by the concurrent negligence of the trains of two railroad corporations. That case was well decided, and in no way upholds the doctrine contended for by the plaintiff's counsel, and is not in point."

Timlin v. Standard Oil Co., 54 Hun, 44, 7 N. Y. Supp. 158, is a case in which a wall fell and killed a person working near it, and it was held that the lessors and lessees were jointly and

severally liable for the same reasons for which they were held liable in the case of the coal-hole in the sidewalk.

It will be observed that in none of these cases is the fact that the act was a public nuisance, as distinguished from a private nuisance, given as a ground of joint liability. Indeed, *Slater v. Mersereau*, ²⁰⁵ 64 N. Y. 138, is a case not of public but of private nuisance.

The distinction suggested in *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879, has no foundation in precedent, and is not believed to be maintainable on principle. The distinction assumes that several torts have been committed, but holds the perpetrator of one liable for the damage from all on the sole ground that his act is a public wrong. If I give you a beating to-day, or rather, if you to-day beat me and to-morrow another does likewise, and in consequence I take to my bed, are you liable to me in damages for all of my injuries because your act was unlawful? In *White v. Conly*, 14 Lea, 51, 52 Am. Rep. 154, the facts are that White and Conly, at a trial before a justice of the peace, engaged in a fight, and while so engaged White's son, acting in sympathy and in aid of his father, but without his knowledge, cut Conly with a knife, of which wound he died, and the widow of Conly sued both father and son to recover damages. The court charged, in substance, that if the father willfully fought he was engaged in an unlawful act, and that if while so engaged the son inflicted the wound, both were liable, and accordingly a verdict was returned against both, but the supreme court overruled *Beets v. State* (19 Tenn. Meigs) 106, on which the instruction was based, and approves what is said in 1 Bishop's Criminal Law, section 439, that "the true view is doubtless as follows: Every man is responsible, criminally, for what of wrong flows directly from his corrupt intentions; but no man, intending wrong, is responsible for an independent act of wrong committed by another."

That an act was a delict, as distinguished from ²⁰⁶ a quasi delict, may be a reason for denying contribution among those answerable for it (*Palmer v. Wick and Pulteneytown Steam Shipping Co., Ltd.*, [1894] App. Cas. 318), but it is not a wrong for making one wrongdoer answer for the wrongs of another merely because they result in injury to the same person.

The city requested twenty special instructions, only two of which were given. That some that were not given should

have been given will appear from what has been already said. They are too numerous to set out or to consider in detail, and it is sufficient to say that no injury to the plaintiff's property was shown, that the discomforts arising from the acts complained of were not so serious as to induce her to seek to restrain them, that the recovery should have been limited to damages for injury to plaintiff's comfort occasioned solely by the acts of the city, and that the amount of the recovery must be attributed to the erroneous instructions given to the jury.

Judgments reversed.

Shauck, C. J., and Crew, Spear and Davis, JJ., concur.

SUITS AND ACTIONS AGAINST TWO OR MORE PERSONS CREATING OR MAINTAINING A NUISANCE.

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I. Scope of Note.

The primary object of this note is to discuss when actions are maintainable either at law or in equity, against two or more persons who create or maintain a nuisance. But to make the note complete, the

nature and elements of private nuisances generally, as well as some of the circumstances and incidents applicable to such nuisances, are briefly noted, because the law controlling the right to maintain actions for nuisances which result from the acts of several persons is not the same in cases of private nuisances as in those which are public. The substantive law on the question as to what constitutes a public nuisance is fully discussed in the note attached to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 195, and hence is not here considered. In connection with this note, see the notes on enjoining nuisances attached to *Crichton v. Dahmer*, 35 Am. St. Rep. 673, and *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551. For the liability of municipal corporations for creating and maintaining a nuisance, see the notes to *City of Ft. Worth v. Crawford*, 15 Am. St. Rep. 845; *Chalkley v. City of Richmond*, 29 Am. St. Rep. 737; *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 395, and *Winchel v. Waukesa*, 84 Am. St. Rep. 916.

II. Nature and Elements of Private Nuisances.

a. *In General.*—The definition of a private nuisance given in 3 Blackstone's Commentaries, page 216, "Anything done to the hurt or annoyance of the lands, tenements or hereditaments of another," has been adopted by the courts generally: *Coker v. Birge*, 4 Ga. 425, 54 Am. Dec. 347; *Laffin & R. etc. Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34, 23 N. E. 389, 7 L. R. A. 262; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Attorney General v. Steward*, 20 N. J. Eq. 415; *Catlin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 567; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665. In fact, no authority seems to question the correctness of this definition, but Mr. Cooley, in his work on Torts (second edition, page 565), contends that the words "hurt or annoyance" refer not only to physical injury, but also an injury to the owner or possessor as respects his dealing with, possessing, or enjoying it, and this view is sanctioned in *Ellis v. Kansas City etc. R. Co.*, 63 Mo. 131, 21 Am. Rep. 436; and *Kavanah v. Barber*, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689. But as many things which are not nuisances per se may become so unless placed under proper regulation or restriction (*Geiger v. Filor*, 8 Fla. 325), the question whether the particular use of a property amounts to a nuisance must be determined by the facts of each particular case: *Des Plaines v. Payer*, 125 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677; hence the illustrations hereafter given will better serve to show what acts have been considered actionable private nuisances than the general rule above stated. It will be well to note some of the fundamental principles applicable alike to actions at law and to suits in equity, where the creation or maintenance of a nuisance is the cause of action.

b. *Intent and Malice.*—As a general rule, the intent with which acts constituting a nuisance are accompanied is immaterial: *Bonnell*

v. Smith, 53 Iowa, 281, 5 N. W. 128; Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461; Picard v. Collins, 23 Barb. 444; Olmstead v. Rich, 53 Hun, 638, 6 N. Y. Supp. 826; Metzger v. Hochrein, 107 Wis. 267, 81 Am. St. Rep. 841, 83 N. W. 308, 50 L. R. A. 305. But in equity a different doctrine has been sometimes applied, and acts alleged to be a private nuisance have been enjoined because done maliciously, though the doing thereof under other circumstances might not amount to a nuisance: Burke v. Smith, 69 Mich. 380, 37 N. W. 838; Kirkwood v. Finnegan, 95 Mich. 543, 55 N. W. 457; Hunt v. Coggin, 66 N. H. 140, 20 Atl. 250; Medford v. Levy, 31 W. Va. 649, 13 Am. St. Rep. 887, 8 S. E. 302, 2 L. R. A. 368.

c. **Negligence as an Element of Liability.**—In an action against those creating or maintaining a nuisance, the existence of the nuisance fixes the liability without proof of negligence on the part of the defendants: Berger v. Minneapolis Gas Light Co., 60 Minn. 296, 62 N. W. 336; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Tremain v. Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Bohan v. Port Jarvis Gas Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Pach v. Geoffroy, 67 Hun, 401, 22 N. Y. Supp. 275, affirmed in 143 N. Y. 661, 39 N. E. 21.

III. Acts or Matters Causing Private Nuisance.

a. **Care and Precaution Against Causing Injury.**—Where the use of property results in producing a nuisance, the fact that the owners used reasonable care and the best appliances in its management does not constitute a defense in an action for damages caused by its operation: Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 25 Am. St. Rep. 595, 20 Atl. 900, 9 L. R. A. 737; Bielman v. Chicago, St. Paul & K. C. Ry. Co., 50 Mo. App. 151; Frost v. Berkeley Phosphate Co., 42 S. C. 402, 46 Am. St. Rep. 736, 20 S. E. 280, 26 L. R. A. 693. Nor is it a defense to an action to enjoin it: Robinson v. Baugh, 31 Mich. 290; People v. Detroit etc. Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567.

b. **Similar Annoyances or Injuries.**—It is no defense to an action for maintaining a nuisance that others are engaged in similar acts: Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000; Euler v. Sullivan, 75 Md. 616, 32 Am. St. Rep. 420, 23 Atl. 845; Indianapolis Water Co. v. American Strawboard Co., 57 Fed. 1000. And the fact that one of the complainants in a bill to enjoin a nuisance is engaged in maintaining the same kind of a nuisance, or that all who are injured do not join in the bill, is no defense: Corley v. Lancaster, 81 Ky. 171; Milhan v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314.

IV. Locality, Circumstances and Incidents.

“Whether a thing is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to circumstances. What would be a nuisance in

Belgrave square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture, carried on by the traders or manufacturers, in a particular and established manner, not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong": *Sturges v. Bridgman*, L. R. 11 Ch. Div. 852, 48 L. J. Ch. 785, 11 C. H. D. 852, 41 L. T. 219, 28 Week. Rep. 200. The above language of Lord Justice Thesiger expresses the doctrine generally adhered to by the American courts in actions to enjoin or abate private nuisances as we shall hereafter see; but as to actions for damages against those creating or maintaining a private nuisance, the rule seems to be that where a trade or business is carried on so as to cause a nuisance, it is a wrong for which an action on the case will lie without regard to locality, the lawfulness of the business, its usefulness to the public, or the fact that its owners use every possible means to operate it in such manner as not to cause a nuisance: *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595, 20 Atl. 900, 9 L. R. A. 737; *Pinckney v. Ewens*, 4 L. T., N. S., 741; *Stockfort Water Works v. Potter*, 7 Hurl. & N. 160, 31 L. J. Eq. 9, 7 Jur., N. S., 880; *Rylands v. Fletcher*, L. R. 3 H. C. (Eng. & Ir. App.) 330. And in *Louisville & N. R. Co. v. Orr*, 91 Ky. 109, 15 S. W. 8, a railroad which operated its trains through a city street was held liable to the owners of property abutting on the street for damages caused by smoke, soot and cinders.

V. Acts Authorized or Prohibited by Law.

a. **By Statute.**—It has been held that that which is authorized by law cannot be a nuisance: *Williams v. New York Cent. R. Co.*, 18 Barb. 222; *Currier v. West Side E. P. R. Co.*, 6 Blatchf. 487, Fed. Cas. No. 3493; and this doctrine is upheld in *Murtha v. Lovewell*, 166 Mass. 391, 55 Am. St. Rep. 410, 44 N. E. 347, where an injunction against the maintenance of a foundry sanctioned by statute was refused, although it constituted a nuisance at common law. And this doctrine is also upheld in New York, but to constitute a defense, the acts must be expressly authorized by statute, or by the plainest and most necessary implication from the powers expressly conferred: *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537. Hence the right given to a gas manufactory by statute to hold real estate and sell gas was no defense to an action against it for a nuisance caused by its manufacture of gas: *Bohan v. Port Jarvis Gas Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711.

But in *Woodruff v. North Bloomfield Min. Co.*, 9 Saw. 441, 18 Fed. 753, it is stated that the law always implies that rights granted by statute shall be exercised by their owners with due regard to the rights of other persons. And acting upon this theory it is held in some jurisdictions that where a private nuisance is caused in the

exercise of rights granted by statute, the party injured can, nevertheless, abate it; hence the fact that a dam was built by authority of statute did not prevent a riparian owner from abating it as a nuisance if it caused the water to back up on his land to his damage: *State v. Moffitt*, 1 G. Greene, 247; and a similar doctrine is found in *City of Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650.

b. By Ordinance or Municipal Grant.—The rule laid down in the New York cases above cited with reference to rights granted by statute seems to apply in the case of rights granted by ordinance, viz., that the acts must be expressly authorized or the liability will not be excused; for in *Churchill v. Burlington Water Co.*, 94 Iowa, 89, 62 N. W. 646, it is held that an ordinance allowing the erection of a public work did not release the owner from liability for the nuisance caused by smoke, soot and noxious ordors emitted therefrom.

c. By License.—License from a city is no justification in an action against a private nuisance: *Sullivan v. Roger*, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655; *Nichols v. Pixley*, 1 Root (Conn.), 129; *De Give v. Seltzer*, 64 Ga. 423; *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577.

d. Acts in Violation of Law.—Acts declared a nuisance by law will be restrained: *Rand v. Wilber*, 19 Ill. App. 395. But they must be nuisances per se: *Sheldon v. Weeks*, 51 Ill. App. 314; *Village of St. John v. McFarland*, 33 Mich. 72, 20 Am. Rep. 671; *Warren v. Cavanaugh*, 33 Mo. App. 102. And when anything is declared a nuisance by statute it is not competent for those maintaining it to show that it is in fact not one: *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929.

VI. Persons Liable.

a. In General.—The general principle laid down in *Wood on Nuisances*, section 875, that all persons co-operating or participating in the creation or maintenance of a nuisance are liable, is fully upheld: *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909; *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Slater v. Mersercan*, 64 N. Y. 138; *Olmstead v. Rich*, 53 Hun, 638, 6 N. Y. Supp. 826; *Evans v. Wilmington & W. R. Co.*, 96 N. C. 45, 15 S. E. 529; *Comminge v. Stevenson*, 76 Tex. 642, 13 S. W. 556; *Marine Ins. Co. v. St. Louis etc. R. Co.*, 41 Fed. 643. There is no conflict in authority in this point, but in actions against two or more persons for creating or maintaining a nuisance the above rule is of little value unless the liability is joint, for the damage caused by each separate tort-feasor is in most cases difficult of ascertainment. True, it has been held that any one of several persons who contribute to a nuisance is liable, though his acts alone might not have amounted to a nui-

sance: *Harley v. Merrill Brick Co.*, 83 Iowa, 73, 48 N. W. 1000; *Marine Ins. Co. v. St. Louis etc. R. Co.*, 41 Fed. 643. But liable for how much? The most frequent cases of private nuisances resulting from the combined acts of several are the pollution of natural watercourses and the smoke, soot, noises and odors arising from the operation of manufacturing establishments, and it is practically impossible in such cases to determine the amount of the injury caused by each separate wrongdoer. The rules governing the right to maintain an action at law for damages resulting from a nuisance caused by the acts of several persons are entirely different from those governing the right to enjoin and abate such nuisances, and we will therefore discuss them separately.

b. In Actions at Law for Damages.

1. **When the Nuisance is Private.**—It is now well settled that if two or more persons who create or maintain a private nuisance act entirely independently of one another, and without any community of interest, concert of action, or common design, each is liable only so far as his acts contribute to the injury; and those injured by the nuisance must proceed in separate actions against the several wrongdoers for the proportion of damage caused by each separately: *Miller v. Highland Ditch Co.*, 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; *Sellick v. Hall*, 47 Conn. 260; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 44 Am. St. Rep. 522, 39 N. E. 909; *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; *Harley v. Merrill Brick Co.*, 83 Iowa, 73, 48 N. W. 1000; *Bowman v. Humphrey*, 124 Iowa, 744, 100 N. W. 854; *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; *Martinowsky v. City of Hannibal*, 35 Mo. App. 70; *Watson v. Colusa-Parrott Min. Co.*, 36 Mont. 513, 79 Pac. 14; *Blaidsell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Williams v. Sheldon*, 10 Wend. 654; *Van Steenburg v. Tobias*, 17 Wend. 562, 31 Am. Dec. 310; *Parthenheimer v. Van Order*, 20 Barb. 479; *Wallace v. Drew*, 59 Barb. 413; *Chipman v. Palmer*, 77 N. Y. 52, 33 Am. Rep. 566; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, note, 58 N. E. 142, 51 L. R. A. 687; *Evans v. Wilmington & W. R. Co.*, 96 N. C. 45, 1 S. E. 529; *City of Mansfield v. Bristol*, 76 Ohio St. 270, ante, p. 852, 81 N. E. 631; *Little Schuylkill etc. Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Gallagher v. Kemmerer*, 144 Pa. 509, 27 Am. St. Rep. 673, 22 Atl. 970; *Swain v. Tennessee Copper Co.*, 111 Tenn. 430, 78 S. W. 93; *Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690; *Lull v. Fox & W. Imp. Co.*, 19 Wis. 100; 2 Jaggard on Torts, p. 797. The only case formed which seems to uphold a contrary doctrine is that of *Slater v. Mercereau*, 64 N. Y. 138, and this case has been often referred to by those seeking to establish the joint liability of several persons who maintain a nuisance. But that was not a case of nuisance, and while the

language of the court might be broad enough to justify its application to the class of cases now under consideration, it was really a case decision, based on the peculiar facts of that case, and the court evidently believed that there was community of interest, concert of action, or a common purpose and design or joint concurrent negligence on the part of the defendants, and of course if any of these elements existed, the joint and several liability is unquestioned. But whatever force could otherwise be given to this case, the doctrine therein announced, so far as it might be applicable to nuisances, has been distinctly repudiated in the later cases of *Chipman v. Palmer*, 77 N. Y. 52, 33 Am. Rep. 566, and *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142, 51 L. R. A. 687. In fact, the *Chipman* case is one of the leading cases on the doctrine that there can be no joint liability without concert of action. The plaintiff in that case kept a boarding-house near a natural stream of water. The defendant kept one higher up the stream, the sewage from which ran into the stream. Sewage from other boarding-houses and hotels located on or near the stream above plaintiff's premises also emptied into the stream, the water of which became polluted. The lower court charged that the defendant was not liable beyond what he had himself done, and that if sewage from other sources had contributed to produce the damage, the jury might apportion it. The court said: "The first proposition contained in the charge was clearly correct. The right of the plaintiff to recover of the defendant all the damages which he had sustained by reason of the nuisance, I think, cannot be maintained. The injury was not caused by the act of the defendant alone, or by that of others who were acting jointly or in concert with the defendant. It was occasioned by the discharge of sewage from the premises of the defendant and other owners of lots into the creek separately and independently of each other. The right of action arises from the discharge into the stream, and the nuisance is only a consequence of the act. The liability commences with the act of the defendant upon his own premises, and this act was separate and independent of, and without any regard to, the act of others. The defendant's act being several when it was committed, cannot be made joint because of the consequences which followed in connection with others who had done the same or a similar act. It is true that it is difficult to separate the injury, but that furnishes no reason why one tort-feasor should be liable for the act of others who have no association and do not act in concert with him. If the law was otherwise, the one who did the least might be made liable for the damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution, or to adjust the amount among the different parties. So, also, proof of an act committed by one person would entitle the plaintiff to recover for all the damages sustained by the acts of others who severally and independently may have contributed to the injury. Such a rule can-

not be upheld upon any sound principle of law. The fact that it is difficult to separate the injury done by each one from the others furnishes no reason for holding that one tort-feasor should be liable for the acts of others with whom he is not acting in concert": *Chipman v. Palmer*, 77 N. Y. 52, 33 Am. Rep. 566.

Another leading case is that of *Little Schuylkill etc. Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209. Here the owner of a dam sought to hold the owner of a colliery located near the stream, some miles above his dam, liable for the filling up of his dam caused by dirt and coal-dust thrown into the stream by the defendant, and also by the owners of several other collieries located at different points on the stream above plaintiff's dam. The jury were charged that the defendant was liable in damages for the combined result of the acts of all. Agnew, Judge, speaking for the court, used the following language: "The doctrine of the learned judge is somewhat novel, though the case itself is new; but if correct, is well calculated to alarm all riparian owners who may find themselves, by a slight negligence, overwhelmed by others in gigantic ruin. It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal-dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal-dirt, he who threw in the coal-dirt, and he who felled the trees, would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream—this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterward became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions. True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury, in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say that, because the plaintiff fails to prove the

injury one man does to him, he may therefore recover from that one all the injury that others do.”

One of the latest cases involving an action for damages for a nuisance caused by two or more persons is that of *Bowman v. Humphrey*, 124 Iowa, 744, 100 N. W. 854. The case was well considered and the doctrine established by the older cases is followed, as the following language of the court will show: “It is undoubtedly true that where an injury results from the concerted action of two or more persons, each may be held liable for the entire damages occasioned; but to sustain a recovery, concert of action must be made to appear. By this we are not to be understood as saying that it must be shown in all cases that the tort-feasors acted in confederation with each other, or pursuant to an agreement between themselves to do the wrong. In many cases it is sufficient to show simply that they acted together knowingly in bringing about the result complained of. Where, however, one of the tort-feasors acts separately and for himself alone, and not in concert with others, especially if he act without knowledge that the other is doing anything to bring about the injury complained of, he cannot be made liable for any damages not the direct and proximate result of his own acts. And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule, nor make anyone liable for the acts of others.”

2. **When the Nuisance is Public.**—Though the acts of tort-feasors are separate and distinct as to time and place, if they culminate in producing a public nuisance, which injures the person or property of another, they are jointly and severally liable, and all of those whose acts combine to constitute a public nuisance may be joined as parties defendant in an action for damages by the party injured: *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911.

In *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879, several tenants in common of farming land lying on White river brought an action for damages against the owners of three paper factories, whose factories were located on a creek tributary to White river. The chemicals deposited in the creek from the factories were carried into the river and poisoned the water, killing fish, creating noxious vapors, breeding flies and other insects, and rendering the water of the river unfit for watering stock. The defendants claimed that there was no concert of action between them, and that if liable at all, they were severally and not jointly liable. The court said: “Objection is made by appellants that the acts alleged, if done at all, were performed severally and independently by them, and hence

there can be no joint liability therefor. It is probably true that an action at law for the recovery of money damages, as distinguished from a suit in equity, cannot be maintained jointly against various tort-feasors among whom there is no concert or unity of action and no common design, but whose independent acts unite in their consequences to produce the damage in question. A distinction, however, is recognized between such acts, which are wrongful only because injurious to individual rights, and those which combine and constitute a public nuisance. In the former class of cases each separate wrongdoer is chargeable with his own acts alone, in the absence of a joint purpose among the participants; in the latter each may be answerable in a joint and several action, not only for what he himself does, but likewise for the acts of those who, with him, violate public as well as private rights. If a party deliberately places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful act of others, violates an express statute and creates a public nuisance, he is not in a position to assert that he should be held responsible to individuals specially damaged for only the actual loss he alone has occasioned them. He must have anticipated the natural and probable consequences of his acts, namely, the violation of a public right; and the public interest requires he shall, if need be, even in a civil action, bear the full burden of the wrong he has assisted in inflicting. Nor is it material that his act of itself, and without reference to the co-operation of others, would create a public nuisance. He must be deemed to know, in a case such as the present, that, if this wrong combines with similar acts of third parties, the result will be to intensify the public and private injury. The welfare of the community demands that he who thus intentionally and aggressively assists either in creating or maintaining a public nuisance in defiance of positive enactment shall answer in civil damages for all injurious consequences proximately resulting therefrom to private individuals who bring themselves within the requirements of the law."

c. Protest Against Nuisance not Necessary.—It is no defense to an action for damages against those creating or maintaining a nuisance that the plaintiff had not protested against the existence of the nuisance: *Stephens v. Garner Creamery Co.*, 9 Kan. App. 883, 57 Pac. 1058; *Aldrich v. Wetmore*, 56 Minn. 20, 57 N. W. 221; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201.

d. Continuance of Nuisance.—Every continuance of a nuisance or recurrence of the injury is an additional nuisance, forming in itself the subject matter of a new action: *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; *Watts v. Norfolk etc. Ry. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 521, 23 L. R. A. 674; notes attached to *Ohio etc. R. Co. v. Wachter*, 5 Am. St. Rep. 589, and *St. Louis etc. Ry. Co. v. Biggs*, 20 Am. St. Rep. 177.

VII. Injunction and Abatement.

a. In General.—We have seen that in actions for damages against two or more persons for creating or maintaining a private nuisance each person contributing to the nuisance is liable only for his proportionate share of the injury inflicted, and also that an action cannot be maintained against all of the tort-feasors jointly. This not only necessitates a multitude of actions, but in many cases the damages recoverable must be only nominal. The nuisance, however, can be abated by recourse to a court of equity. “The remedy in equity to abate a nuisance is said to exist whenever the nature of the injury is such that it cannot be adequately compensated by damages, or will occasion a constantly occurring grievance”: Adams’ Equity, p. 211. Hence when the separate and independent businesses of several persons together combine to constitute a nuisance, they may be joined in a bill for injunctive relief: *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; *Hillman v. Newington*, 57 Cal. 56; *People v. Gold Run Ditch Co.*, 66 Cal. 138, 56 Am. Rep. 80, note, 4 Pac. 1152; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *City of Mansfield v. Bristol*, 76 Ohio St. 270, ante, p. 852, 81 N. E. 631; *Madison v. Ducktown Sulphur etc. Co.*, 113 Tenn. 331, 83 S. W. 658; *Clowes v. Staffordshire*, L. R. 8 Ch. App. 125, 42 L. J. Ch. 167, 21 L. T. 521, 21 Week. Rep. 32; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650. These decisions are based upon the reasoning stated in *Thorpe v. Brumfitt*, L. R. 8 Ch. App. 650.

“Suppose one person leaves a wheelbarrow standing on a way; that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he does causes of itself no damage to the complainant.”

As all who contributed to a private nuisance may be joined in a bill for injunctive relief, so, also, all who are injuriously affected by it in the same way, though their lands are separate and distinct from one another, may unite as complainants in the bill for relief: *Palmer v. Waddell*, 22 Kan. 352; *Rowbotham v. Jones*, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663; *Madison v. Ducktown Sulphur etc. Co.*, 113 Tenn. 331, 83 S. W. 658; *Jung v. Neraz*, 71 Tex. 396, 9 S. W. 344. And ordinarily equity will restrain a nuisance per se, or something which will necessarily become a nuisance: *Ogletree v. McQuagg*, 67 Ala. 580, 42 Am. Rep. 112; *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463; *San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396; *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571; *Thebaut v. Canova*, 11 Fla. 143; *De Give v. Seltzer*, 64 Ga. 423; *De Vaughn v. Minor*, 77 Ga. 809, 1 S. E. 433; *Field v. Barling*, 149 Ill. 556, 41 Am. St. Rep. 311, 37 N. E. 850, 24 L. R. A. 406; *Barrett v. Mt. Greenwood Cemetery Assn.*, 159 Ill. 385, 50 Am. St. Rep. 168, 42

N. E. 891, 31 L. R. A. 109; Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 62 Am. St. Rep. 532, 47 N. E. 2, 37 L. R. A. 381; Dumesnil v. Dupont, 18 B. Mon. 800, 68 Am. Dec. 750; Ellison v. City of Louisville, 17 Ky. Law Rep. 593, 31 S. W. 723; Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; Attorney General v. Jamaica P. A. Corp., 133 Mass. 361; Whitfield v. Rogers, 26 Miss. 84, 59 Am. Dec. 244; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567; Attorney General v. Blount, 11 N. C. 384, 15 Am. Dec. 526; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

b. Equitable Relief not a Matter of Right.—While a judgment for damages against those creating or maintaining a nuisance is matter of absolute right, an injunction is not a writ of right, but lies within the sound discretion of the court. In 2 Story's Equity Jurisprudence, section 959, it is said: "No injunction will be granted when it will operate oppressively or inequitably or contrary to the real justice of the case." And it has been further said that "the true intent of a court of equity being to do justice between the parties, it will not issue a restraining order, except when the rights of the parties demand it, and in determining this question, all the circumstances of location, the effect of the act claimed to be a nuisance, and the effect upon the defendant's business and interests will be considered; and while the usefulness of the business, or its importance, magnitude or extent will not in all cases prevent interference, yet if the injury on the one hand is small and fairly compensable in damages, and the loss to the other party would be large and disastrous, an injunction will be refused and the party left to his legal remedy: Wood on Nuisances, 3d ed., p. 1182.

That relief by injunction against a nuisance is not a matter of right, but rests within the sound discretion of the court is abundantly supported: Clifton Iron Co. v. Dye, 87 Ala. 468, 6 South. 192; Demarest v. Hardman, 34 N. J. Eq. 469; Booth v. Rome etc. R. R. Co., 140 N. Y. 267, 37 Am. St. Rep. 552, 35 N. E. 592, 24 L. R. A. 105; Richard's Appeal, 57 Pa. 105, 98 Am. Dec. 202; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221; Huckenstein's Appeal, 70 Pa. 102, 10 Am. Rep. 669; Clack v. White, 2 Swan (Tenn.), 540; Powell v. Bentley & Gerwig Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; Parker v. Winnipiseogee etc. Lake Co., 2 Black (U. S.), 545, 17 L. ed. 333; Wood v. Sutcliffe, 2 Sim., N. S., 163, 21 L. J. Ch. 253, 16 Jur. 75. In the last case an injunction was sought to prevent the alleged pollution of a stream, and the vice-chancellor remarked: "Whenever a court of equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry, strict rights of the plaintiff and defendant, but also to the surrounding circumstances."

In the exercise of their discretionary powers in granting injunctions to prevent nuisances, courts of equity proceed with great caution—though the right of a court of equity to afford injunctive relief against private nuisances is not questioned, the exercise of this power is of comparatively recent growth. Equity does not construe the maxim, “*Sic utere tuo, ut alienum non laedas*,” to mean that every injury which may result to others from the use of one’s own authorizes equitable interference, but it will afford relief only when some legal right of the injured party has been invaded, for otherwise it would be *damnum absque injuria*. The test seems to be whether the act or use is a reasonable exercise of the dominion which an owner of property has over his own with reference to the rights of others who may be affected. The principles which courts of equity apply in the exercise of their discretion in cases involving the subject now under discussion is well expressed by the chancellor in *Demarest v. Hardman*, 34 N. J. Eq. 469: “The court should always, in cases of this kind, consider the customs of the people, the nature and character of their employments, the uses to which they generally devote their property, and the circumstances and surroundings of the business which is alleged to be a nuisance. What would constitute a nuisance in one place would be perfectly legitimate in another. The rights and comfort of the complainant must not be looked at alone. The rights and interest of his neighbors must also be regarded. . . . The principle to be deduced from the authorities I understand to be this: that an injunction to restrain a lawful business, on the ground that it is so conducted as to render it a nuisance, should never be granted, except the complaint shows an invasion of a clear, legal right, resulting in permanent and serious injury, which cannot be adequately redressed by action at law, and that the allowance of the writ will not inflict upon the defendant a more serious injury than the complainant will sustain if the writ is denied, and he be left to his ordinary legal remedy. Equity takes cognizance of a nuisance which is permanent in its character, or which produces a constantly recurring grievance, more readily than any other.”

c. **Right must be Clear.**—Before equity will enjoin a business alleged to be so conducted as to produce a nuisance, not only must the bill state a proper case, but the right must be clear and the injury clearly established: *Barnard v. Shirley*, 135 Ind. 547, 41 Am. St. Rep. 454, 35 N. E. 117, 24 L. R. A. 568; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 62 Am. St. Rep. 532, 47 N. E. 2, 37 L. R. A. 381; *McCutchen v. Blanton*, 59 Miss. 116; *Holsman v. Boiling Springs etc. Co.*, 14 N. J. Eq. 335; *Duncan v. Haycs*, 22 N. J. Eq. 25; *Hackensack Imp. Co. v. New Jersey etc. R. Co.*, 22 N. J. Eq. 94; *Simpson v. Justice*, 8 Ired. Eq. 115; *Kirkman v. Hardy*, 11 Humph. 406, 54 Am. Dec. 45; *McGregor v. Silver King Min. Co.*, 14 Utah, 47,

60 Am. St. Rep. 883, 45 Pac. 1091; *Hilton v. Earl of Granville*, Craig & P. 283; *The Earl of Ripon v. Hobart*, 3 Mylne & K. 169. For if there is a reasonable doubt as to the cause of the injury, the doubt will be resolved in favor of the defendants: *Owen v. Phillips*, 73 Ind. 284; *Gilbert v. Showerman*, 23 Mich. 448; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221; *Irwin v. Dixon*, 9 How. (U. S.) 10, 13 L. ed. 25; *Parker v. Winnipiseogee etc. Lake Co.*, 2 Black (U. S.), 545, 17 L. ed. 333; *Tuttle v. Church*, 53 Fed. 422; *Crowder v. Tinkler*, 19 Ves. 617, 13 B. R. 267; *Melter v. Serf*, 4 Eng. L. & Eq. Rep. 15. In *McCutchen v. Blanton*, 59 Miss. 116, it is said: "Every doubt should be resolved against the restraint of a proprietor in the use of his own property for a purpose seemingly lawful and conducive to both individual gain and the general welfare. Relief by injunction is so severe in its consequences that it is not to be granted in such a case, except when the right to it is clearly and conclusively made out. To interfere with one's right to use his own land for the production of what he pleases, in case of doubt would be a flagrant abuse of power. It is not enough to show a probable and contingent injury, but it must be shown to be inevitable and undoubted."

And the rule that equity will refuse to interfere unless the injury is certain and not merely contingent is also strongly expressed by Lord Brougham in *Earl of Ripon v. Hobart*, 3 Mylne & K. 169: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stop irreparable mischief without waiting for the result of a trial. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere when the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property which are *prima facie* harmless, or even praiseworthy, is equally manifest. And it is always to be borne in mind that the jurisdiction of this court over nuisances by injunction, at all, is of recent growth, has not till very lately been much exercised, and has, at various times, found great reluctance on the part of the learned judges to use it even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. It is also very material to observe that no instance can be produced of the interposition by injunction in the case of what we have been regarding as an eventual or contingent nuisance."

d. **The Injury must be Irreparable.**—We have seen that equity would not restrain a nuisance unless the danger was certain. It

must likewise be irreparable, for if the complainant has an adequate legal remedy equity will not interfere: *Rosser v. Randolph*, 7 Port. 228, 31 Am. Dec. 712; *Middleton v. Franklin*, 3 Cal. 238; *Thebant v. Canova*, 11 Fla. 143; *Harrison v. Brooks*, 20 Ga. 537; *Wahle v. Rembach*, 76 Ill. 322; *Varney v. Pope*, 60 Me. 192; *Dumesnil v. Dupont*, 18 B. Mon. 800, 68 Am. Dec. 750; *Fort v. Groves*, 29 Md. 188; *Dorman v. Ames*, 12 Minn. 451; *Gwin v. Melmoth*, 1 Freem. Ch. (Miss.) 505; *Burnham v. Kempton*, 44 N. H. 78; *Robeson v. Pettinger*, 2 N. J. Eq. 57, 32 Am. Dec. 412; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *Holsman v. Boiling Springs etc. Co.*, 14 N. J. Eq. 335; *McNeal v. Assiscunk Creek etc. Co.*, 37 N. J. Eq. 204; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Davis v. Lamberston*, 56 Barb. 480; *Attorney General v. Blount*, 11 N. C. 384, 15 Am. Dec. 526; *Barnes v. Calhoun*, 37 N. C. 199; *Ellison v. Town of Washington Commrs.*, 58 N. C. 57, 75 Am. Dec. 430; *Dorsey v. Allen*, 85 N. C. 358, 39 Am. Rep. 704; *McElroy v. Gobb*, 6 Ohio St. 187; *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221; *Caldwell v. Knot*, 10 Yerg. 209; *Clack v. White*, 32 Tenn. 540; *Wingfield v. Crenshaw*, 4 Hen. & M. (Va.) 474; *Parker v. Winnipiseogee etc. Lake Co.*, 2 Black (U. S.), 545, 17 L. ed. 333; *Nutbrown v. Thorton*, 10 Ves. 163; *Attorney General v. Nicol*, 16 Ves. 338, 10 R. R. 186; *Cherrington v. Abney*, 2 Vern. 646; *Bathhurst v. Barden*, 2 Bro. C. C. 64.

e. Relief must be Sought with Reasonable Promptness.—While an action for damages against those creating or maintaining a nuisance can be brought at any time during the existence of the nuisance and without any protest on the part of the one injured having been previously made, in equity, if one is guilty of laches in filing his bill, relief may be denied, though it might otherwise have been promptly granted. "A party may by laches deprive himself of an equitable remedy against a nuisance. Thus, if a party sleeps on his rights and allows a nuisance to go on without remonstrance, or rather without taking measures either by suit at law or in equity to protect his rights, and allows the party to go on making large expenditures about the business which constitutes the nuisance, he will be regarded as guilty of such laches as to deprive him of equitable relief particularly until the right is first settled at law. And when the delay is also coupled with an acquiescence, he will be deprived of all equitable relief, and may be placed in a position where the court will enjoin him from proceeding against the nuisance at law, or even to prevent the recovery of a judgment obtained therefor in a court of law": *Wood on Nuisances*, sec. 804. This doctrine is fully upheld in *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 South. 192; *Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Morris & C. Ry. Co. v. Prudden*, 20 N. J. Eq. 530; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Reid v. Gifford*, 6 Johns. Ch. 19; *Goodall v. Crofton*, 33

Ohio St. 271, 33 Am. Rep. 535; Power's Appeal, 125 Pa. 175, 11 Am. St. Rep. 882, 17 Atl. 254; Stewart Wire Co. v. Lehigh C. & N. Co., 203 Pa. 479, 53 Atl. 1127; Sprague v. Rhodes, 4 R. I. 301; Caldwell v. Knot, 10 Yerg. 209; Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265; Wood v. Sutcliffe, 2 Sim., N. S., 163, 21 L. J. Ch. 253, 16 Jur. 15; Birmingham Canal Co. v. Lloyd, 18 Ves. 515, 11 R. R. 345; Earl of Ripon v. Hobart, 3 Mylne & K. 169; Cooper v. Hub-buck, 30 Beav. 160; Graham v. Bierkenhead etc. Ry. Co., 12 Beav. 460, 2 Mac. & G. 146, 2 H. & T. W. 450, 20 L. J. Ch. 455, 14 Jur. 494; Attorney General v. Sheffield Gas Consumers Assn., 3 De Gex, M. & G. 304, 22 L. J. Ch. 211, 17 Jur. 677, 1 Week. Rep. 185. These cases fix no time within which injunctive relief against an exist-ing nuisance should be sought, but establish the general doctrine that it must be within a reasonable time, but apparently what is to be considered a reasonable time rests within the discretion of the chancellor, who will, in determining the question, be guided by the circumstances of the case. Thus in Caldwell v. Knot, 10 Yerg. 209, a nuisance was restrained which had been in existence for ten years, while in the English case of Attorney General v. Sheffield Gas Consumers Assn., 3 De Gex, M. & G. 304, L. J. Ch. 211, 17 Jur. 677, 1 Week. Rep. 185, an injunction was denied because the complainants had wasted nine months after the injurious character of the business complained of became known, before applying for relief. The complainant in this case had allowed the defendants to expend large sums of money in the business before attempting to prevent the nuisance, and it is largely upon the principle of ac-quiescence that the doctrine of laches is founded. As was said in the recent case of Stewart Wire Co. v. Lehigh C. & N. Co., 203 Pa. 474: "Relief by injunction is not controlled by arbitrary or tech-nical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Where a party seeks the intervention of a court of equity to protect his rights by in-junction, the application must be reasonably made, or the rights may be lost, at least so far as equitable intervention is concerned. It is a rule practically without exception that a court of equity will not grant relief by injunction when the party seeking it, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers his adversary to incur expenses and enter into burdensome engagements which would ren-der the granting of an injunction against the completion of the un-dertaking, or the use thereof when completed, or great injury to him. A suitor who by laches has made it impossible for a court to enjoin his adversary, without inflicting great injury upon him, will be left to pursue his ordinary legal remedy."

f. **When Nuisance Complained of Tends to Promote Public Con-venience.**—It has been held that equity will not restrain a nuisance

when the business complained of tends to promote the public convenience: *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 South. 192; *Harrison v. Brooks*, 20 Ga. 537; *Barnes v. Calhoun*, 37 N. C. 199. And while it is undoubtedly true that equity proceeds with great caution in restraining a nuisance where the business causing it is beneficial to the public (*Attorney General v. Perkins*, 2 Dev. Eq. 38), yet if the private injury is disproportionate to the advantage to the public, the nuisance will be enjoined: *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Bradsher v. Lea's Heirs*, 38 N. C. 301; *Brown v. Carolina Central Ry. Co.*, 83 N. C. 128.

g. Offensive Character of Nuisances.—To render a business liable to injunction and abatement as a nuisance, it must be such as is offensive to persons of ordinary nature and disposition, and not merely to delicate and sensitive persons: *Ditman v. Repp*, 50 Md. 516, 33 Am. Rep. 325; *Rogers v. Elliott*, 146 Mass. 349, 4 Am. St. Rep. 316, 15 N. E. 768; *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490; *Catlin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 567.

THOMAS v. STATE.

[76 Ohio St. 341, 81 N. E. 437.]

CONSTITUTIONAL LAW—*Ratification by Legislature.*—Legislative acts which are void because unconstitutional cannot acquire validity from subsequent legislation. (p. 887.)

CONSTITUTIONAL LAW—*Obligation of Contracts—Change in Judicial Opinion.*—A change in judicial opinion in respect to the constitutionality of a statute is in its operation upon pre-existing contracts the same as will be given a statute, viz., it operates prospectively and not retrospectively. (p. 887.)

CONSTITUTIONAL LAW—*Change in Judicial Opinion.*—Contracts executed under the favor of statutes which the highest courts of the state have declared valid are themselves valid as against subsequent decisions to the contrary. (p. 889.)

CONSTITUTIONAL LAW—*Change of Judicial Opinion of Which Contractors Need not Take Notice.*—Where a particular statute has been declared valid by the highest courts of the state, parties contracting under it remain entitled to its protection, although subsequent decisions have declared general principles inconsistent with the prior decision. The court of last resort having affirmed the validity of particular legislation, the assurance so given can be withdrawn only by a contrary decision with respect to the same legislation, or like legislation upon the same subject. (p. 890.)

Doyle & Lewis, Bosler & Emanuel, Young & Young and I. H. Goeke, for James R. Thomas et al.

McMahon & McMahon, Rowe & Shuey and O. M. Gottschall, for Philip Gilbert.

J. T. Holmes & Dyer, Williams & Stouffer, for Bailey W. Gilfillan et al.

F. C. Rector, Huggins, Huggins & Johnson, A. T. Seymour and M. E. Thrailkill, for defendant in error.

³⁵⁶ SHAUCK, C. J. On the first day of June, 1905, Phillip E. Gilbert, a taxpayer of Montgomery county, filed a petition in the court of common pleas of that county alleging the facts necessary to entitle him to bring the suit in the capacity of a taxpayer, and praying that the execution of a contract which had been entered into between the appropriate county officials and James R. Thomas, whereby the latter, for a stipulated compensation to be paid by the county, should perform the duties of a tax inquisitor in bringing taxable property of the county upon the duplicate for taxation, should be perpetually enjoined, it ³⁵⁷ being alleged that the payment of the stipulated compensation by the county was unlawful because the contract was not authorized by the terms of any constitutional statute. An answer having been filed, the cause was tried on the pleadings and the evidence, and on July 7, 1905, a judgment was entered in the court of common pleas dismissing the petition. The cause was then appealed to the circuit court, where it was tried de novo upon the pleadings and the evidence. That court being of the opinion that the legislation by which the contract was supposed to be authorized was unconstitutional because repugnant to section 26 of article 2 of the constitution of the state, which ordains that all laws of a general nature should have uniform operation throughout the state, rendered judgment for the plaintiff, perpetually enjoining Thomas from performing any work and from receiving any compensation under the contract. Thomas thereupon filed a petition in error here for the reversal of the judgment of the circuit court. At the last term the case was fully argued and considered upon the question of the constitutional validity of the legislation intended to authorize contracts of this character. We reached the conclusion that it is invalid because repugnant to section 26 of article 2 of the constitu-

tion. The case is reported in *Thomas v. State*, 74 Ohio St. 403, 78 N. E. 523, where the constitutional and statutory provisions involved are fully set out. Upon the announcement of our conclusion counsel for Thomas communicated to us their desire to be heard upon the proposition that in view of previous decisions of this court respecting the validity of such legislation the present conclusion that it is invalid does ³⁵⁸ not justify the denial of compensation from the date of the contract. To afford opportunity for hearing upon that question our mandate was withheld and the causes set for argument with *Gilfillan v. State ex rel. Seymour*, Prosecuting Attorney.

The latter case originated in a suit by a prosecuting attorney in the court of common pleas of Franklin county, to enjoin the payment to Gilfillan of compensation for services to be performed by him as tax inquisitor for Franklin county under contracts executed between him and the appropriate officers of the county, it being alleged, among other things, that said contracts were invalid because the legislation by which they were supposed to be authorized was repugnant to section 26 of article 2 of the constitution. After a final judgment in the court of common pleas the cause was appealed to the circuit court, where it was tried *de novo* upon the pleadings and the evidence. In the court it was determined that the legislation was invalid for the reason stated; but in recognition of Gilfillan's right to rely upon former decisions of this court that this legislation is valid it was held that he was entitled to compensation for services rendered under the contract until this court decided similar legislation invalid, and that date is fixed at May 11, 1899, when this court announced its conclusion in *State v. Buckley*, 60 Ohio St. 273, 54 N. E. 273, where we held that laws relating to the subject of popular elections are of a general nature, and must be of uniform operation throughout the state. The separate statements of conclusions of fact and of law made by the ³⁵⁹ circuit court embrace other questions which need not be stated here, as they relate to the interpretation of the contract and its application to facts shown in the evidence.

In both cases the present inquiry assumes that the legislation referred to is void for repugnancy to section 26 of article 2 of the constitution as decided in *Thomas v. State*, 74 Ohio St. 403, 78 N. E. 523. We have to ascertain to what extent, in view of the previous decisions of this court, the plaintiffs

in error are entitled to rely upon their contracts, notwithstanding the invalidity of the legislation. In one of the briefs there is much reliance upon the act of May 9, 1902 (95 Ohio Laws, 444, Bates' Statutes, sec. 22b-1), entitled "An act to carry into effect the intention both of officials and parties respecting certain county and municipal instruments and proceedings." In view of the abiding character of the restraints imposed by the constitution upon legislative action, one does not readily accept the conclusion that legislative acts which they have made void may receive validity from subsequent legislative acts. The inquiry will be most effectively promoted by adverting at once to the constitutional principles which are involved, for to them it must at last come. The doctrine invoked by the plaintiffs in error is founded on the provisions of the tenth section of the first article of the constitution of the United States that no state shall pass any law impairing the obligation of contracts, and that of section 28 of article 2 of the constitution of this state that "the General Assembly shall have no power to pass laws impairing the obligation of contracts." The courts have not failed to observe the significance ³⁶⁰ of these provisions of the organic laws for the preservation of the inviolability of contracts. To give to them the effect intended the courts have accorded full recognition to the doctrine that when contractual obligations are involved, and to the extent which may be necessary to their enforcement, the interpretation which is placed upon a constitutional provision by the highest tribunal appointed for that purpose is to be regarded as a part of the provision. In numerous authoritative and well-considered cases this doctrine has been stated in varying terms but to the same import. It was stated with care and precision by Chief Justice Waite in *Douglass v. County of Pike*, 101 U. S. 677, 25 L. ed. 968, as follows: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative enactment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contract as an amendment of the law by means of a legislative enactment."

The reporter's abstract of the briefs will show that this doctrine has been recognized in numerous cases, applying it to decisions respecting the validity of statutes as well as to their construction. It was distinctly recognized by this court in *Lewis v. Symmes*, 61 Ohio St. 471, 76 Am. St. Rep. 428, 56 N. E. 194, though its application was there denied, ³⁶¹ because the case involved no contractual obligation. In *City of Cincinnati v. Taft*, 63 Ohio St. 141, 58 N. E. 63, the doctrine was recognized and applied in support of the binding obligation of contracts executed under favor of legislation which this court had previously held to be constitutionally valid, although in the case cited it was admitted to be void under our later decisions. Two distinctions should receive attention. This doctrine may be invoked as a matter of right by all suitors who are in a position to assert the binding obligation of contracts. It is, therefore, broadly distinguishable from the doctrine which courts and writers usually and properly treat under the head of *stare decisis*, which involve only considerations of public policy and propriety, however important they may be. The provision of the federal constitution is that no state shall pass any law impairing the obligation of contracts, while the express restriction of the constitution of the state is upon the general assembly. The duty of the courts of the state would be obvious from a consideration of the purposes in view. It becomes clearer when attention is given to the provision of the federal constitution, for that would not be more clearly violated by an act of the legislature impairing the obligation of a contract than by judicial decision impairing the obligation of contracts authorized by laws of which the decision of the court of last resort affirming their validity had become a part.

Upon principle this doctrine may be regarded as entirely consistent with the commonly accepted doctrine that an unconstitutional act of the legislature is not a law, but a nullity. It is in accordance ³⁶² with the general rule that all who assume the validity of legislation do so at their peril. As to them, contracts purporting to be authorized by void legislation have no obligation to be impaired by judicial decisions which apply to them the tests prescribed by the constitution. But that contracts executed under favor of acts which the highest court of the state has declared valid are themselves valid as against subsequent decisions to the contrary, though the acts may not be valid, seems clear for the reasons already

stated, and the distinction is clearly implied by the terms in which the courts have stated the doctrine which the plaintiffs in error invoke. The terms of the doctrine require a consideration of the decisions of this court respecting legislation of this character prior to the commencement of these suits. In *State v. Cappeller*, 39 Ohio St. 207, the court had to determine the proper interpretation of statutes relating to the assessment and collection of taxes and the payment for services rendered in that behalf, and the constitutional validity of the act of April 14, 1880, entitled "An act to more fully secure the taxation of real and personal property in Ohio and for levying taxes thereon according to its true value" (77 Ohio Laws, 205). The act assumed to authorize such contracts as these and to provide for the ratable deduction of money paid for services rendered in that behalf from the several funds in the treasury of the county. Although the title of the act comprehended the entire state, the first section by artifice limited its operation to Hamilton county. The opinion shows that the court did not regard the act as having a uniform operation throughout the state, but it appears ³⁶³ to have been regarded as not a law of a general nature because it did not operate throughout the state. Analysis of the opinion in that case is not necessary, for the third section of the syllabus prepared by the court as the authoritative statement of the points decided is: "Section 1 of the act of April 14, 1880 (77 Ohio Laws, 205), is not in conflict with either section 26 or 28, article 2 of the constitution." The legislative act upon which the plaintiffs in error relied when rendering a part of the service under the present contracts was before this court at the January term, 1891, in *State v. Crites*, 48 Ohio St. 142, 26 N. E. 1052, when it gave the utmost assurance possible to those who contemplated entering into such contracts, it being stated in the syllabus that "the act of April 10, 1888 (85 Ohio Laws, 170), entitled 'An act to secure a fuller and better return of property for taxation and to prevent omissions of property from the tax duplicate' is constitutional, and a contract made pursuant to its provisions is legal and valid." The former decisions of this court, therefore, clearly justify the resort by counsel for the plaintiffs in error to the doctrines stated in support of their conclusion that these contracts are not entirely destitute of validity in view of the circumstances under

which they were executed, although the legislation may be wholly invalid.

To this extent the judgment of the circuit court in *Gillan v. State* is in accordance with the views we have expressed. But in that court it was thought that this court had withdrawn its authority for reliance upon the validity of the legislation involved on May 9, 1899, ³⁶⁴ when it decided *State v. Buckley*, 60 Ohio St. 273, 54 N. E. 272. It is true that in that case, and in other cases arising at about the same time, the consideration of this court was given to the constitutional provision here involved, namely, that laws of a general nature must have uniform operation throughout the state, but neither the case specially referred to nor any other involved in the general consideration dealt with the present subject of legislation, and they could not have determined that it is general and therefore within the constitutional requirement. Those cases do not make plainer than it had been ever since the adoption of the constitution that laws which are of that nature must have that operation, though some of them held laws to be of that nature which had not been so regarded in previous decisions. The changes in decisions in all the cases referred to in the present inquiry resulted from the present acceptance of the view that a general subject of legislation does not change its character because a legislative act respecting it may, by the General Assembly, be given only a local operation. The court of last resort in the state having in the most authoritative manner affirmed the validity of this legislation, the assurance so given could be withdrawn only by a contrary decision with respect to the same legislation or like legislation upon the same subject. The doctrine recognized as necessary to preserve the obligation of contracts does not permit the denial of compensation to the plaintiffs in error until their right thereto was challenged by the original petitions filed in the court of common pleas in the cases which resulted in the judgments here reviewed. ³⁶⁵ Other questions discussed by counsel in the case of *Gillan v. State* are, we think, foreclosed by the record, and the judgments will be modified only in the respect indicated.

The judgments of the circuit court will be vacated and the causes remanded to that court, with instructions to enter such modified judgment as will permit payment to the plaintiffs in error of the stipulated compensation for the services which

they rendered before the filing of the original petitions in these causes.

Judgment accordingly.

Price, Crew, Summers, Spear and Davis, JJ., concur.

A Change of Judicial Construction in respect to a statute should be given the same effect, in its operation on contracts and existing contract rights, that would be given to a legislative amendment—that is to say, its operation must be prospective, not retrospective: *Lewis v. Symmes*, 61 Ohio St. 471, 76 Am. St. Rep. 428.

An Amendment to the Constitution authorizing the legislature to enact a particular law cannot impart validity to a law of the same character previously enacted, but which was unconstitutional when so enacted: *State v. Tuffy*, 20 Nev. 427, 19 Am. St. Rep. 374.

GERMANIA FIRE INSURANCE COMPANY v. WERNER.

[76 Ohio St. 543, 81 N. E. 980.]

INSURANCE—Valued Policies, Construction of Statute Respecting.—A statute requiring every person insuring any building to have an examination thereof made and its value fixed by his agent, and providing that, in the absence of any change in the risk without the consent of the insurers and also of fraud on the part of the assured, the whole amount of the policy shall be paid in case of a total loss, refers only to a change in the condition of the property affecting its value, and does not prevent the operation of a condition of the policy making it void in the event of the property becoming vacant and unoccupied. (p. 897.)

Actions to recover for loss of property by fire, which loss had been insured against by the policies in suit. In both cases the juries were charged that the defendant must prove not only vacancy and occupancy different from that provided in the policy, but also increase in the hazard because of the want of occupancy or change in occupancy. The court also refused, when requested by defendants, to instruct the jury to find for the defendant if the premises were not occupied at the time of the fire. Verdict and judgment for the plaintiff in both cases, and such judgments were affirmed in the one case by the superior court of the general term, and in the other by the circuit court.

Hartwell Cabell and J. L. Kohl, for the plaintiff in error in case No. 9973.

G. W. Hengst and L. M. Mongan, for the defendant in error in case No. 9973.

J. W. Mooney, for the plaintiff in error in case No. 10,099.

S. M. Winn and J. C. Bassett, Jr., for the defendant in error in case No. 10,099.

⁵⁵¹ DAVIS, J. These cases have in common one point, which is decisive of each case. In one of the cases the policy provides that if a building therein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days, the entire policy shall be void, unless otherwise provided by agreement indorsed thereon or added thereto. At the time of the fire, and for more than ten days previous thereto, the premises were wholly unoccupied without the knowledge of the insurer. In the other case the policy provides that if the premises described therein shall become vacant, unoccupied or uninhabited without written consent ⁵⁵² thereon, the policy shall be null and void. The building described in the policy was not occupied when the fire occurred nor for a considerable time before. Both cases are therefore controlled by *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519, unless a change of occupancy amounting to a vacancy is within the words, "any change increasing the risk," occurring in section 3643 of the Revised Statutes.

So much of the section as is material to the present purpose is as follows: "Any person hereafter insuring any building or structure against loss or damage by fire or lightning shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk without consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy shall be paid, and in case of a partial loss the full amount of the partial loss shall be paid."

This enactment was passed March 5, 1879 (76 Ohio Laws, 26), and the policy which was sued on in *Farmers' Ins. Co.*

v. Wells, 42 Ohio St. 519, was issued a year and a half after the passage of this act and was clearly governed thereby, if the statute covers such a case. It is not discoverable, however, that any reference was made to the statute by counsel or court, at any stage of the case, through several years of litigation. Inasmuch as the able counsel and the judges of the several courts must be presumed to have known of the existence of the statute, the inference is very strong that it was conceded ⁵⁵³ all around that the statute did not apply to the facts of that case. Yet, since the reason for the silence of this court upon that point can only be conjectural, the question here still remains with us. The ruling in *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519, however, stands unquestioned and unqualified, except inferentially in cases hereinafter commented upon.

Proceeding, now, to a construction of the statute, it will be noticed that it first, distinctly and without any ambiguity whatever, provides what may be required by "any person hereafter insuring any building or structure." He "shall cause such building or structure to be examined by an agent of the insurer." It is not required that the examination shall extend to the uses, purposes and surroundings of the "building or structure," nor to ownership, encumbrances, possession or exposures of the "building or structure"; for if we may go outside of the explicit language of the statute for one thing, we may for all. The information to be acquired by such an indefinite and extended examination may be valuable, and even necessary, in some aspects of the contract of insurance; but the purpose of the statute is satisfied when the examination is limited to the thing to be insured, that is, the "building or structure," and when the insurer's agent has made a full description and fixed the insurable value "thereof," that is, of the "building or structure." Now we come to the latent ambiguity of the statute, an ambiguity which disappears entirely if we keep in mind the sole purpose of the statute, to fix a value on the insured "building or structure" which should be unquestionable in case of a total loss and without regard to any other controversies which might ⁵⁵⁴ arise between the parties to the contract. "In the absence of any change increasing the risk without consent of the insurers, . . . in case of total loss, the whole amount mentioned in the policy . . . shall be paid," says the statute. Any change in what? Manifestly, in the "build-

ing or structure'' which is insured and valued, because only that is the subject matter of the statute and of the whole sentence in which the phrase ''any change'' occurs. ''All words of a general nature not express and precise are to be restrained unto the fitness of the subject matter or the person'': *Steamboat Messenger v. Pressler*, 13 Ohio St. 255.

Considerations similar to these have led this court to hold that a stipulation in a policy that it shall become void by the taking of additional insurance without the consent of the insurer, and a stipulation that a policy shall become void if any part of the property insured shall be encumbered by mortgage without the consent of the company, are not within the provisions of section 3643 of the Revised Statutes: *Sun Fire Office of London v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *Webster v. Dwelling-House Ins. Co.*, 53 Ohio St. 558, 53 Am. St. Rep. 658, 42 N. E. 546, 30 L. R. A. 719. The ground of these judgments was admirably stated by Minshall, J., in the first case cited here, as follows: ''This examination relates only to the physical condition of the property, and, therefore, by the ordinary rules of construction the general language immediately following should be limited to a change in such things as come within the purpose of the examination. So interpreted, they can mean no more than that, in the absence of any change in the physical condition of the property ⁵⁵⁵ increasing the risk the full amount of the insurance shall be paid in case of a total loss. If it had been intended to enlarge the meaning so as to embrace other matters made material by the terms of the policy, more apt words could and, as we think, would have been used. The language would have been so introduced as not to be naturally restrained by the context to a more limited meaning.'' But it was also said in that case that: ''A careful reading of the statute will disclose, as we think, a simple purpose on the part of the legislature to limit it to such matters connected with the physical condition of the property—its value, structure and surroundings, as might have been discovered in the examination required to be made''; and in the other case it was said by the judge who delivered the opinion of the court that ''the change referred to in the statute relates to some physical change in the insured building, its use or its surroundings,'' etc.: See p. 568. Now, as we have already said, we see no warrant in the statute for extending its terms over anything else than the ''building or struc-

ture'' which is the subject of the insurance; and we think that we have demonstrated that the statute was not intended to include or apply to anything distinct from, or accidentally related to, the corpus of the insured building. We, therefore, think it unfortunate that these able judges did not speak on this subject with their usual close discrimination; otherwise we might not have been called upon to review the subject now. Those cases, however, ended in proper judgments, as we think it must be conceded; and if covenants such as those are not annulled by the statutes, where shall the ⁵⁵⁶ line be drawn? It was argued in the above quotation from *Sun Fire Office of London v. Clark*, 53 Ohio St. 414. 42 N. E. 248, 38 L. R. A. 562, and in an opinion by Laubie. J., in 7 Ohio C. C. 511, 519 et seq., to which special reference is made in *Webster v. Dwelling-House Ins. Co.*, 53 Ohio St. 558, 53 Am. St. Rep. 658, 42 N. E. 546, 30 L. R. A. 719, that if it had been intended to enlarge the meaning of the precise words of the statute so as to embrace other matters made material by the agreement of the parties, it would have been more natural to have said so definitely and directly. That seems to be sound reasoning, and if true, then the conclusion would seem to follow that the legislature meant what it said, and no more; and it would also seem to follow, conversely, that if the courts may stretch the words, from their obvious meaning of any change in the building or structure, to any change in the occupation of the building, then there is no limit to such judicial legislation as would eliminate every condition of the policy relating to title, possession, encumbrance, overinsurance, use, occupation, and the like. We cannot think that the legislature ever intended to be so interpreted.

The courts below in both cases now before this court followed the case of *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 49 Am. St. Rep. 699, 38 N. E. 1011, 26 L. R. A. 313. The reasoning in support of the final judgment in that case is peculiar and, it seems to us, unsatisfactory. On the point now under consideration, the opinion occupies less than a page and is, in substance, as follows: "The statute, being in force when the policy was issued, became a part of the contract of insurance, and controls its construction and operation." It is undoubtedly true that the statute controls according to its intent and meaning. "The condition of the ⁵⁵⁷ policy in regard to the occupancy is therefore so quali-

fied by the statute, that, in the absence of intentional fraud on the part of the insured, to make the change from occupancy to disuse or want of occupancy available as a defense, it must appear that the risk was increased." With all respect, we are unable to see that the conclusion follows the premises. *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45, is cited to support the conclusion, and we will examine it presently. The opinion continues: "It is well settled that the risk is not necessarily, or *prima facie* increased, by the insured property becoming vacant or unoccupied (citing authorities). And, therefore, when the insurer pleads such change as a defense to an action on the policy, the answer must allege that the risk was increased on account of it, unless the insured was guilty of fraud." That is the whole reasoning upon this point; and the last "therefore" might be accepted as valid if it had been first shown that "such change" was within the meaning of the statute.

We now take up *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45, which seems to have been relied upon as the chief cornerstone of *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 49 Am. St. Rep. 699, 38 N. E. 1011, 26 L. R. A. 313. Since no reason was given for the ruling in *Moody v. Amazon Ins. Co.*, except a reference to this case, we have looked through it carefully for some attempt to show that the words of the statute, "any change," mean any change whatever, in the broadest sense, instead of any change in the building or structure; but we have looked in vain. The construction is dogmatically announced (page 415), without any attempt at elucidation. After a statement of the substance of the statute, the following ⁵⁵⁸ unsupported declaration is made: "If, after the policy is issued, there be any change in the condition or surroundings of the property which increases the risk, without the consent of the insurer, or, if there be intentional fraud on the part of the insured, these are regarded by the statute as matters of substance, and may defeat a recovery on the policy." This is substantially all of the opinion in the *Leslie* case on this point; and the syllabus is no clearer than the statute, for it is in the same language as the statute. It reads as follows: "The more effectually to accomplish these results, the statute holds the company liable on its policy, unless, after its issue, a change occurs increasing the risk," etc. Against this we must place the

same query which arises upon a reading of the words of the statute. A change in what?

We have been referred also to Milwaukee Mechanics' Ins. Co. v. Russell, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159. That case was decided on the points stated in the syllabus, all the judges concurring; but it must be apparent from the report that at least half of the members of the court did not concur in all that was said in the opinion by Williams, J.

The citation of cases which have been decided upon the authority of Moody v. Amazon Ins. Co., 52 Ohio St. 12, 49 Am. St. Rep. 699, 38 N. E. 1011, 26 L. R. A. 313, is beside the question. The question clearly presented here is, whether, in view of section 3643 of the Revised Statutes, Farmers' Ins. Co. v. Wells, 42 Ohio St. 519, controls these cases, or whether they must be decided according to Moody v. Amazon Ins. Co., 52 Ohio St. 12, 49 Am. St. Rep. 699, 38 N. E. 1011, 26 L. R. A. 313. Our conclusion is, for the reasons stated, that the law as stated in Farmers' Ins. Co. v. Wells, 42 Ohio St. 519, has not been qualified by the statute, ⁵⁵⁹ and that Moody v. Amazon Ins. Co., 52 Ohio St. 12, 49 Am. St. Rep. 699, 38 N. E. 1011, 26 L. R. A. 313, must be overruled.

The judgments below are reversed and judgment for the plaintiffs in error.

Shauck, C. J., Price, Crew and Summers, JJ., concur.

Spear, J., dissents.

A Statute Requiring Every Insurer before issuing a policy to examine the building to be insured and fix the insurable value thereof, and providing that a recovery on the policy may be had, notwithstanding any subsequent change affecting the risk, applies only to the condition of the building, and does not impair the effect of a condition in the policy against the making of any subsequent encumbrance on the property without notice to and consent by the insurer: Webster v. Dwelling-House Ins. Co., 53 Ohio St. 558, 53 Am. St. Rep. 658.

Am. St. Rep., Vol. 118—57

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

HERON v. HOUSTON.

[217 Pa. 1, 66 Atl. 108.]

CONSTITUTIONAL LAW—Party-walls.—The legislature has a constitutional right to confer upon municipalities the power of regulating party-walls. (p. 898.)

PARTY-WALLS—Statutory Right to Erect.—Every owner of a lot of ground in a city has statutory right to make a party-wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken from him by the adjoining owner, building exclusively upon his own land, either to the line or a short distance therefrom. (pp. 899, 900.)

Suit to restrain the building of a party-wall. The parties are adjoining owners of property in the city of Pittsburgh, there being a three-story brick dwelling upon plaintiff's lot, and a one-story building on the defendants'. The defendants notified the building inspector of the city of their intention to construct a party-wall on the division line between the two properties, and requested him to appoint a time for hearing the parties, as provided by statute. He did so, and thereupon this bill was filed, denying the necessity for the wall, averring irreparable damage in the event of its construction, and denying that the statute confers upon defendants authority to require plaintiff to submit to the erection of a party-wall.

The bill was dismissed, and the plaintiff appealed.

J. S. Ferguson and E. G. Ferguson, for the appellant.

M. Pflaum, for the appellees.

3 STEWART, J. It is too late at this day to question abstractly the right of the legislature to confer upon municipalities the power of regulating party-walls. Never since
(898)

we have been a state have we been without legislation of this kind; and every enactment on the subject has contained the fundamental feature here challenged—constitutional warrant for the appropriation, under municipal regulation, by one of two adjoining lot owners of a certain portion of the other's land, for the construction of a party-wall for their common enjoyment and use. This legislation has not only been acquiesced in and acted upon until it has become a settled rule of property, which it would be most dangerous to public interest to disturb, but its constitutionality has been recognized by judicial authority in unmistakable terms. "There can be no available objection," is the language of the court in *Evans v. Jayne*, 23 Pa. 34, "to the principle upon which our law as to party-walls is based. . . . The principle is no invasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation by a boundary more substantial than a mathematical line." The principle upon which these enactments rest is the general police power of the state. While it must be admitted that they are to a certain extent an interference with that exclusive enjoyment ordinarily incident to ownership of land, and are therefore to be strictly construed: *Hoffstot v. Voight*, 146 Pa. 632, 23 Atl. 351; yet our adjudications under them are but so many repeated recognitions of their correspondence with constitutional limitations.

Nor can the other question sought to be raised by appellant be regarded as an open one. A strict construction of the ⁴ statute leaves the appropriation of appellant's property, for purposes of a party-wall, within their legitimate operation according to our own adjudications. In *Appeal of the Western National Bank*, 102 Pa. 171, it is said: "Every owner of a lot of ground in Philadelphia has a statutory right to make a party-wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom." What is true of the law relating to Philadelphia applies with equal force to the particular statute here under consideration. The fact that the erection of the party-wall here complained of will involve the appropriation and possible removal of appellant's eastern wall, built wholly within his own line, and so contract

the dimensions of his present hall or entry to his building, only furnishes another illustration of how general laws in their application may in individual cases result in apparent severity and injustice. Such apparent inequality necessarily results; but all are alike exposed to the chance, and the risk is part of the price which each pays for equal participation in all that is provided for the general safety and the common good.

The assignments of error are overruled. The decree affirmed, and the bill is dismissed at the costs of the appellant.

The Law of Party-walls is the subject of a note to *Duncomb v. Randolph*, 89 Am. St. Rep. 924.

SNYDER'S ESTATE.

[217 Pa. 71, 66 Atl. 157.]

WILLS—Latent Ambiguity—Parol Evidence to Explain.—If a testatrix bequeaths to a legatee a certain amount of stock in a bank which she designates in her will as the "Second National Bank of Mercer," and there is no such bank in the town of Mercer, there arises a latent ambiguity in the will, and evidence dehors it is properly admitted to show what stock was the subject of the bequest. (p. 901.)

WILLS—Specific Legacies.—A specific legacy or devise is a gift by will of a specific article or part of the testator's estate, identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing. (p. 902.)

WILLS—Legacies.—The Law Leans Against Specific in favor of general legacies. (p. 902.)

WILLS—Legacies—General or Specific.—A bequest, in general terms, of a certain amount of stock, without identifying any particular shares or distinguishing those given from all others of the same kind, is a general and not a specific legacy. (p. 902.)

WILLS—Legacies—Presumption Against Specific.—A legacy of corporate stock of whatever denomination is not *prima facie* specific, but is a general legacy, although the testator may have had stock of the description mentioned sufficient to answer the bequest. (pp. 903, 904.)

E. N. Baer and J. G. White, for the appellant.

Q. A. Gordon, for the appellees.

⁷² BROWN, J. At the time the testatrix, Ann Eliza Snyder, executed her will she was the owner of twenty-six shares

of the capital stock of the Farmers' and Mechanics' National Bank of Mercer of the par value of one hundred dollars each. Among other bequests are the following: "I also give and bequeath to the said Ina Stuart six hundred dollars of bank stock of the Second National Bank of Mercer, said bank being located in Mercer, Mercer County, Pa. . . . I give and bequeath to my beloved brother Peter Myers two thousand dollars of the Bank stock of Bank referred to above."

It is admitted that there did not exist at the time the will was written, or at any other time, a bank in Mercer under the corporate name of the "Second National Bank of Mercer." From this misdescription of the stock there arose a latent ambiguity in the will, and evidence dehors it was properly admitted to explain it and to show what stock was the subject of the bequests: *Best v. Hammond*, 55 Pa. 409. Under the admissions before the auditor and the testimony offered, there can be no doubt that she meant by the "Second National Bank of Mercer" the Farmers' and Mechanics' National Bank of Mercer. The first national bank to be established in that place was the First National Bank of Mercer, organized in 1864, and carrying ⁷³ on business ever since. The second national bank to be established in the town was the Farmers' and Mechanics' National Bank of Mercer, organized in 1874. It was at this bank, of which the testatrix was a stockholder, that she transacted all of her banking business. She acquired the stock in it from her husband, Jacob Snyder, deceased, who gave it to her by his will dated April 14, 1879. In it he calls the stock "the capital stock of the Second National Bank stock of Mercer, said bank being located in Mercer, Mercer county and state of Pennsylvania." The Farmers' and Mechanics' National Bank undoubtedly, and naturally, too, was known and designated by the testatrix and others as the Second National Bank, because in point of time it was the second national banking institution to be organized in the town. It is, therefore, clear that when she referred to bank stock as stock of the Second National Bank of Mercer, she meant stock of the Farmers' and Mechanics' National Bank of that place.

After she executed her will, the testatrix exchanged her twenty-six shares of the Farmers' and Mechanics' National Bank stock for stock in the Mercer County Trust Company, and, as she did not have the bank stock at the time of her death, the appellant, her residuary legatee, insisting that the

legacies to the appellees were specific, contends that they were adeemed, and that the sums awarded to them should have passed to him.

The law leans against specific legacies and to general ones: *Blackstone v. Blackstone*, 3 Watts, 335, 27 Am. Dec. 359; *Ludlam's Estate*, 13 Pa. 188; *Balliet's Appeal*, 14 Pa. 451. "A specific legacy or devise is a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing": 18 Am. & Eng. Ency. of Law, 2d ed., 714. By these two bequests the testatrix does not give to the legatees specific shares of bank stock belonging to her, but gives to each of them, in general terms, a certain amount of stock, without identifying any particular shares or distinguishing those given from all others of the same kind of stock. Under all the authorities these are general legacies.

In *Blackstone v. Blackstone*, 3 Watts, 335, 27 Am. Dec. 359, the words of the bequest were: "I give and bequeath all my two hundred ⁷⁴ and fifty shares of capital stock which I hold in the Union Bank of Pennsylvania." Gibson, Chief Justice, in holding that this legacy was specific, said: "The remaining question is, whether the legacy before us is a specific one. The bequest is of 'all my two hundred and fifty shares of capital stock which I hold in the Union Bank of Pennsylvania.' The words 'which I hold' certainly individuate the stock as a corpus with as much precision as would the words 'standing in my name,' which made the bequest specific in *Sleech v. Thornington*, or the words 'all the stock which I have in the three per cents,' which was allowed to have the same effect in *Humphreys v. Humphreys*, and it is even more specific than the words in *Drinkwater v. Falconer*, 'to be paid out of my dividends of 400 l. in the joint stock of South Sea annuities, now standing in the company's books in my name,' which were held to be sufficiently so, though the stock was described as a fund for payment, because the residue was given in nearly the same terms, and charged with the preceding bequest. It is certainly true that the presumption of intention is favorable to general legacies in the first instance, and that it requires clear proof of a restrictive intention to repel it; but the word 'my' prefixed to the word 'annuities' or stock has always been held sufficient of itself to do so, though the mere possession of such annuities or stock at the date of the

will, without words of reference to fix its identity as the subject of bequest, has come short of it." The bequest in Ludlam's Estate, as taken from the opinion of Judge King in the court below, 1 Parsons' Select Equity Cases, 116, was: "One thousand dollars of the United States six per cent stock or loan of the year 1812, standing in my name on the books of the loan office, Pennsylvania, as per certificate No. 269." Of this bequest it was said by Coulter, J.: "We come then to the question whether this was a specific legacy or not. If it was specific (of the very corpus of the United States stock held by the testator), then it was adeemed; because the corpus of that stock was extinguished and paid to the testator before his death. The words of the bequest would seem to leave little doubt on this subject: 'One thousand dollars of the United States six per cent stock of the year 1812, standing in my name in the loan office Penn'a, as per certificate ⁷⁵ No. 269.' It is not a bequest of one thousand dollars, payable out of stock held by him; but one thousand dollars of stock which stands in his name in the loan office, by certificate 269. It is the very thing itself, the corpus of the stock, that is bequeathed. In *Blackstone v. Blackstone*, 3 Watts, 335, 27 Am. Dec. 359, where the bequest was 'of all my two hundred and fifty shares of stock which I hold in the bank, together with such interest as may have accrued thereon,' and where it appeared that testator sold the stock in his lifetime, and took a bond for the same, although there was evidence that the testator declared the bond should be in lieu of the stock, it was ruled that the legacy was adeemed. There, the change of the corpus of the legacy was from bank stock into a bond; here, the change is from government stock into money, which mingled itself with the other money of the testator. There, it was 'my bank stock which I hold'; here, it is 'my government stock, standing in my name, on the books,' etc., 'as per certificate 269.' One does not individuate the corpus of the gift more distinctly than the other, and each is so definite as to defy mistake. These very words, to wit, 'stock standing in my name,' were held in *Barton v. Cooke*, 5 Ves. 461, to make a legacy specific." But such are not the legacies here. There is nothing on the face of the bequests to show that any particular shares of the bank stock should pass to the legatees. The testatrix does not refer to them as "my bank stock," or as stock "which I hold." The bequests are simply of two thousand six hundred dollars of bank stock. In *Sponsler's Appeal*,

107 Pa. 95, the testator had at the time of the execution of his will and at his death but fifteen shares of second preferred Cumberland Valley Railroad stock. A bequest to Alice Rheem of "fifteen shares of second preferred Cumberland Valley Railroad stock" was held to be a general legacy, Gordon, J., saying: "Any fifteen shares of the preferred stock of the Cumberland Valley Railroad Company would meet and fulfill the donation."

The rule as to legacies of stock is thus laid down in Hawkins on Wills, *301, and these bequests are strictly within it, for the testatrix had twenty-six shares of the stock of the bank, worth, at par, two thousand six hundred dollars: "A legacy of stock, of whatever denomination, is not *prima facie* specific, but is a general legacy, although the testator may have had stock of the description ⁷⁶ mentioned sufficient to answer the bequest: *Simmons v. Vallance*, 4 Bro. C. C. 345; *Purse v. Snaplin*, 1 Atk. 414; *Sibley v. Perry*, 7 Ves. 522. Thus, if the testator, having one thousand l. 3 per cents, or long annuities, bequeaths that sum to A, the gift is not adeemed by the sale of the stock in his lifetime, but operates as a direction to the executor to purchase the stock for A out of the general assets. The rule is the same whether the gift be of '1,000£ 3 per cents,' or of '1,000£ in the 3 per cents': *Webster v. Hale*, 8 Ves. 410." In *Robinson v. Addison*, 2 Beav. 515, a testator owning fifteen and a half shares of stock in the Leeds and Liverpool Canal Company, bequeathed five and a half shares of stock in that company to A, five shares to B, and five shares to C. There was no description or reference in the will to show that he intended to give the particular shares which he held at the date of his will. At his death he possessed no shares in the said canal company, and it was held that the legacies were general and not specific. The stock of that company was seldom sold in the market, and it was urged for that reason, apart from the disposal of the precise number of shares held by the testator, that he must have intended to give these specific shares, and not that his executor should purchase them for the legatees out of the general assets of his estate. The court held the legacies to be general, saying: "It is, however, clear that the testator, if he had meant to give only the shares which he had, might have designated them as 'his'—that the mere circumstance of the testator having, at the date of his will, a particular property, of equal amount to the bequests of the like property which he has

given without designating it as the same, is not a ground upon which the court can conclude that the legacies are specific. . . . There is no description or reference to show that he meant to give the particular shares which he had at the date of his will, nor any trust from which it can, as it appears to me, be concluded that he must have meant only such shares as he had at the respective times of making his will and of his death. . . . The shares, though not frequently sold, are nevertheless occasionally bought and sold, and may be had for money." Authorities need not be multiplied to sustain the correctness of the view of the court as to the character of these legacies.

⁷⁷ The testatrix did not intend to give money, for if she had so intended she would have simply made pecuniary bequests to the legatees. What she intended to give them was a certain amount of bank stock, measured by its par value, and what they are entitled to get from her estate is the market value of the same: *Johnson's Estate*, 170 Pa. 177, 32 Atl. 636. The awards to them were upon this basis.

The assignments are all overruled, and the decree is affirmed at appellant's costs.

Specific Legacies are bequests of a specified part of a testator's personal estate, distinguished from all others of the same kind: *Rogers v. Rogers*, 67 S. C. 168, 100 Am. St. Rep. 721. A legacy is specific, not general, when it is of "all the mill stock and bank stock remaining in my name after the decease of my said wife": *Tomlinson v. Bury*, 145 Mass. 346, 1 Am. St. Rep. 464. A bequest of the dividends arising on certain stocks, without a direct and express disposition of such stocks, carries the stocks with it and is specific: *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675. And a bequest of a specified amount in public funds or stock, or money in general, but further describing the property as being then owned by the testator, or particularly describing property embodied in the bequest and owned by the testator at the time of his death, is special and specific: *Evans v. Hunter*, 86 Iowa, 413, 41 Am. St. Rep. 503.

CLIFTON v. PHILADELPHIA.

[217 Pa. 102, 66 Atl. 159.]

MUNICIPAL CORPORATIONS—Rut in Street.—A city is not liable for personal injury received by a person in stepping into a rut in a soft dirt road while alighting from a street-car, when the rut is such as is ordinarily made by wagons, and is only a few inches deep. (p. 908.)

MUNICIPAL CORPORATIONS—Defect in Street Negligence. If an accident happens by reason of some slight defect in a street, from which danger is not reasonably to be anticipated, the municipality is not chargeable with negligence. (p. 908.)

MUNICIPAL CORPORATIONS, Care Required of.—The duty which the law imposes upon a municipality is only to exercise ordinary care to see that the highway is safe for travelers. (p. 908.)

C. W. Boger, J. W. Catharine, assistant city solicitor, and J. L. Kinsey, city solicitor, for the appellant.

A. S. L. Shields, for the appellees.

103 POTTER, J. This was an action of trespass by husband and wife to recover damages for personal injuries to the wife. There was a verdict in favor of the plaintiffs and judgment entered thereon. Defendant has appealed, and assigns as error the refusal to give binding instructions in its favor, and the overruling of the motion for judgment, non obstante veredicto. The single question raised by the appeal is as to the sufficiency of the evidence to justify the submission of the case to the jury.

It appears from the testimony that on the evening of June 3, 1902, at about 10 o'clock, Rebecca W. Clifton, one of the plaintiffs, in alighting from a trolley car at Pulaski and Hunting Park avenues, stepped into a rut in the roadway and fell forward bruising her face, spraining her ankle and otherwise injuring herself. Pulaski avenue, north of Hunting Park avenue, was not a paved street, but was merely a dirt road, **104** except as to that portion upon which the street railway tracks were laid. The grade of that portion was raised five or six inches above the level of the remainder of the road, and the space between the tracks, and for a distance of one foot outside, was paved with Belgian block.

The wife testified that she did not know the character of the road at the spot where she fell, nor did the husband make any examination of it at the time. He went back the next

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day, and says he saw a rut, five or six inches deep, and about three inches wide extending along the edge of the Belgian blocks, caused by wagon wheels as they left the stone paving. It is apparent that the depth of five or six inches referred to by this witness must include the step from the Belgian blocks to the general level of the roadway.

Another witness, who lived just opposite the place where the accident occurred, testified that Pulaski avenue, north of Hunting Park avenue, was not paved. South, it was paved with Belgian block. The cars usually stopped where you could step out on the dirt. The surface there was ashes and different things and was graded five or six inches below the level of the cartway. At the time of the accident there was a hole in the street a couple of inches below where the track was, down off the Belgian blocks. It was made by heavy wagons.

On cross-examination, this witness said that the rut was two or three feet long. The cinder side portion of the road was five or six inches below the grade of the track. It was never level with the track. The hole was a slight rut where the wagons—ice wagons—would pull off the track. Witness estimated that he had seen as many as five hundred people step off the car at that point in one day, and one hundred or two hundred after dark, but never saw any accident occur. There was an arc light about fifteen feet away from the place of the accident, which was burning and threw light all over. There was a good illumination there that night. He admitted, however, that there was a trolley pole between the light and the spot where the plaintiff stepped into the rut, and the husband also testified that the trolley pole cast a strong shadow where his wife fell.

It appears clearly from the evidence that Pulaski avenue ¹⁰⁵ was an old country road, which had been used by the public for many years and had been adopted by the city as a street. As noted above, with the exception of the space between the railway tracks and for a distance of perhaps a foot outside, it was still a dirt road, filled in from time to time with ashes, cinders and oyster shells. So far as we can gather from the evidence, the locality is a suburban one on the outskirts of the city. The road was much traveled, and the place where plaintiff alighted was the usual stopping place for the cars, where many persons got on and off, both by day and night.

The rut into which plaintiff stepped was only that which was worn by wagon wheels, as they left the edge of the Belgian block along the outside of the street-car track. It does not appear to have been anything more than an ordinary rut, such as is constantly made by the wheels of heavy wagons in all dirt roads when soft or muddy, or when the soil of the roadway is not closely packed. As one of the witnesses explained, these ruts are temporary in their nature, and are shifted from place to place in the roadway, being liable to be filled by a passing wheel, which makes a new rut in turn, adjacent to the line of the old one.

It would be imposing a very great and burdensome degree of care upon a municipality to hold it to the duty of keeping dirt roads free from ruts of the nature and character of this one in question. The same degree of smoothness is not to be expected upon a dirt road as is to be looked for on an asphalt street. It would hardly occur to a highway commissioner that a rut worn by wagon wheels in soft ground could be in any way dangerous to the public. In *Osterhout v. Bethlehem*, 55 N. Y. App. Div. 198, 68 N. Y. Supp. 845, the court said: "I doubt if upon country roads a rut caused mainly by the ordinary travel of wagon wheels in wet weather has ever been deemed a necessary subject of repair. Those defects cure themselves with the advance of the season, and such conditions the farmers learn to anticipate in the use of the highway at that time of year."

No roadbed has ever been invented or used which is not subject to wear and to some degree of displacement when used by heavy vehicles, and this effect cannot be prevented. When an accident happens by reason of some slight defect, from which danger was not reasonably to be anticipated, the municipality ¹⁰⁸ is not chargeable with negligence. The duty which the law imposes upon a municipality is only to exercise ordinary care to see that the highway is safe for travelers: *Kelchner v. Nanticoke Boro.*, 209 Pa. 412, 58 Atl. 851. We can see nothing in the evidence in this case sufficient to sustain the charge of negligence against the defendant, or to justify the submission of the case to the jury.

The assignments of error are sustained, the judgment is reversed and is here entered for defendant.

The Liability of Municipal Corporations to persons injured by defective streets is the subject of a recent note to *Dudley v. Flemings-Lurg*, 103 Am. St. Rep. 257.

CHESTNUT STREET TRUST AND SAVINGS FUND COMPANY'S ASSIGNED ESTATE.

[217 Pa. 151, 66 Atl. 332.]

ASSIGNMENT FOR CREDITORS—Rights of Creditors.—The rights of creditors of an assigned estate are fixed at the date of the assignment, and only those who are creditors of the assignor at that date are entitled to participate in the distribution of the proceeds of the estate. (pp. 910, 911.)

ASSIGNMENT FOR CREDITORS.—A Creditor is one who has a definite demand against the estate, or a cause of action capable of adjustment and liquidation upon the trial. (p. 911.)

ASSIGNMENT FOR CREDITORS—Debts Collectible.—Debts due in praesenti and payable in futuro are claims against the assignor for the benefit of his creditors, for which his estate is liable in the hands of his assignee, and so, also, are damages resulting from the breach of a contract occurring prior to the assignment. (p. 911.)

ASSIGNMENT FOR CREDITORS—Debts not Existing or Contingent at Date of Assignment.—Generally, any claim or demand against an assignor for the benefit of his creditors which is certain, or may be reduced to a certainty at the date of the assignment, is a debt payable out of the assigned estate, but a claim against the assignor arising after the date of the assignment will not be allowed to participate in the distribution of his estate, and the possibility of a claim, depending upon the happening of a contingency in the future, will not constitute a demand for which the assigned estate is liable. (p. 911.)

ASSIGNMENT FOR CREDITORS—Debts Allowable.—A Conditional Bond does not create an indebtedness absolutely payable in the future, but is an obligation which becomes an indebtedness on the happening of a contingency, and until such contingency happens, there is no claim or demand which can be enforced against an assignor for the benefit of creditors, or against his estate. (pp. 911, 912.)

ASSIGNMENT FOR CREDITORS—Debts Collectible—Guardian and Ward.—If a trust company assigns for the benefit of creditors, delivering to its assignee all of its general assets, but retaining and continuing to administer its trust funds, and thereafter funds held by it as surety for a guardian are stolen by one of its officers, the ward in favor of whom no liability has yet accrued cannot participate as a general creditor in the distribution of the funds in the hands of the assignee for the benefit of creditors. (p. 912.)

E. Randall and J. A. Flaherty, for the appellant.

152 MESTREZAT, J. The learned auditor has found and stated the facts of the case, and we think they sustain his conclusion. We recognize the importance of the principle involved and the hardship to the claimant if unsuccessful, as suggested by appellant's counsel, but if the principle ruling the case is settled law, as we think it is, we cannot disregard

it and permit "a hard case to make bad law." If in such cases, cestui que trustent should have better protection from trust companies which are permitted to become sureties on the bonds of their trustees, the remedy is with the legislature. The judicial department of the government cannot usurp the functions of the legislature, and by construction do that which lies exclusively within the province of that department of the government. This is sometimes urged by counsel in the interest of their clients, and also occasionally attempted by courts.

The single question presented for our consideration is the right of the appellant to participate in the distribution of the assigned estate as a creditor by reason of the liability which the trust company incurred as surety on the bond of the appellant's guardian, who failed to account for the funds of her ¹⁵³ ward. The assignment of error raises but this one question. Whether the appellant has another remedy in this or another forum, and whether the trust company and its assigned estate can be held as agent or trustee for the funds placed in its hands and now unaccounted for are questions which are not raised on this record, and with which we are not now concerned. This claim, as presented in the court below and here, is upon the trust company's bond as surety for the guardian, and is against the company's insolvent estate for a pro rata share of the amount which the guardian failed to pay her ward. That there can be no recovery on the bond we think is clear.

The bond given by the guardian and the trust company as surety was approved on December 7, 1889, and was conditioned for the faithful performance of the duties of the guardian. The securities of the ward were delivered by the guardian to the trust company which entered them in its book in which it entered property held by it in a fiduciary capacity. The trust company made an assignment for the benefit of its creditors on December 24, 1897. Subsequently, in March, 1901, the treasurer of the trust company fraudulently disposed of the securities for his own use. At the date of the assignment, therefore, there had been no breach of the bond given by the trust company as surety of the guardian. The securities were then intact and could have been recovered from the company at that time or at any time prior to March, 1901, when they were fraudulently appropriated by its treasurer. Hence, there was no breach of, or liability on, the

bond of the surety for more than three years after the assignment of the trust company for the benefit of its creditors. This being true, the appellant had no claim against the company on the bond at the date of the assignment and, therefore, is not entitled to share in the distribution of the proceeds of the assignor's estate.

The rights of creditors of an assigned estate are fixed at the date of the assignment. Only those who are creditors of the assignor at that date are entitled to participate in the distribution of the proceeds of the estate. A creditor is one who has a definite demand against the estate, or a cause of action capable of adjustment and liquidation upon a trial: *Reading Iron Works*, 150 Pa. 369, 24 Atl. 617. Debts due in *praesenti* and payable ¹⁵⁴ in *futuro* are, of course, claims against the assignor for which his estate is liable in the hands of his assignee. So also are damages resulting from the breach of a contract occurring prior to the assignment. And, generally, any claim or demand against the assignor which is certain, or may be reduced to certainty at the date of the assignment, is a debt payable out of the assigned estate. On the other hand, a claim against the assignor arising after the date of the assignment will not be allowed to participate in the distribution of his estate. And it may be added that the possibility of a claim, depending upon the happening of a contingency in the future, will not constitute a demand for which the assigned estate is liable. The holders of such claims are not creditors entitled to payment out of the estate of an insolvent assignor.

Applying these principles to the case in hand, it is manifest that the appellant has no claim on the funds in the hands of the assignees of the trust company. At the date of the assignment the condition of the assignor's bond had not been broken, and the appellant had no claim which she could have successfully asserted against the assignor. Hence, if she had brought an action against the trust company on that date, she would have been nonsuited because she had no claim or demand, and hence no cause for which an action would lie on the bond. The fact that at some time in the future she might have a claim arising out of the breach of the bond would not support an action nor give her a demand against the obligor's insolvent estate in the hands of its assignees. A conditional bond, such as the one in question, does not create an indebtedness absolutely payable in the future, but is

an obligation which becomes an indebtedness on the happening of a contingency, and, until the contingency occurs, there is no claim or demand which can be enforced against the assignor or his estate. It is apparent, therefore, that under the facts of this case the appellant had no claim against the assignor company at the time of its assignment, and hence can have no claim against the assets which the company assigned for the benefit of its creditors. She is now asserting her right to participate in the fund for distribution as a creditor of the trust company, and her rights are those only of a creditor. As such, she must look for payment to the assignor company and not to its estate, which ¹⁵⁵ passed from it to the company's creditors before it became her debtor.

The doctrine announced in *Jones v. Cooper*, 2 Ark. 54, 16 Am. Dec. 678, is in harmony with our conclusion in this case. That was a claim against an insolvent intestate's estate arising on a bond of indemnity given by the deceased to secure the claimant against liability on a bond, on which he was surety for the deceased as guardian. The administrator denied the right of the claimant to participate in the distribution of the insolvent's estate of his decedent because there had been no breach of the guardian's bond. In sustaining this position, and in discussing what demands may be proved against an insolvent estate, the court said (page 680): "Where there is no subsisting debt or duty, or where the claim, if payable or to be satisfied at a future day, rests in contingency, and it is uncertain whether or not any demand will accrue, it cannot be allowed. There must be a present debt or duty, or a demand in praesenti, payable or to be satisfied at all events in futuro. . . . In cases of insolvent estates, where there is no present duty, and it depends on some future event whether or not a demand will arise, it is obvious that no claim exists which can be proved before the commissioners. . . . The claim must be one which is capable of being liquidated and valued. A contract for the payment of a certain stated sum, or the delivery of certain articles of property, or for the performance of specific acts or services, if to be performed at all events, though at a subsequent time, may be the subject of valuation; but where the performance of the contract depends on a contingency which may never happen, it is evident that it cannot be valued. As the bond declared upon in this case is not for the payment of a sum certain, or the performance of an act at all events, so as to raise a pres-

ent debt or duty, but is conditional, depending on a contingency, it follows that there must at least be a breach of the condition and a consequent forfeiture of the bond to give the appellant a demand against the estate of the intestate."

We have examined the cases cited by appellant and none of them rule this case in her favor. Where the claim was allowed in any of them it was capable of liquidation at the date of the assignment.

The assignees are not responsible to the appellant as bailees¹⁵⁶ of her securities, for the reason that they had no right to the possession of the securities, and in fact never had possession of them. The trust company acquired possession of the securities and held them as it held other property in a fiduciary capacity, and when it assigned its own assets for the benefit of creditors these securities were not included, and did not pass to the assignees. The assignment did not dissolve the trust company: *Germantown Pass. Ry. Co. v. Fitler*, 60 Pa. 124, 100 Am. Dec. 546; and it continued business to the extent of winding up its fiduciary business. It held these securities until they were stolen by its treasurer in March, 1901. If the appellant could trace the securities to the assignees, it would raise another and different question than the one raised on this appeal.

The assignment of error is overruled and the decree is affirmed.

Only Persons Who are Creditors at the time of an assignment for the benefit of creditors can, as a rule, claim under the assignment. And debts thereafter arising are not usually provable against the estate: *Ragsdale v. Winnsboro Nat. Bank*, 45 S. C. 575, 23 S. E. 947; *Danner v. Brewer*, 69 Ala. 191; *Wieder v. Peabody*, 37 Minn. 248, 33 N. W. 852.

LEFFERTS v. DOLTON.

[217 Pa. 299, 66 Atl. 527.]

DEEDS—Insufficient Tender of.—A statement by an agent of the vendor made to the vendee that he has in his pocket a deed executed by the vendor, without producing it and giving the vendee an opportunity to examine it, is not a tender of the deed. (p. 914.)

DEEDS.—To Constitute a Valid Tender of a Deed requiring the vendee to pay the purchase money, a deed duly executed must be produced by the vendor to the vendee, so that the latter may see that

it is regular in form, properly signed, sealed and acknowledged, and that it conveys the estate he bargained for. (p. 915.)

DEEDS—Waiver of Tender of.—If the tender of a deed from the vendor to the vendee is absolutely insufficient, the latter will not be deemed to have waived a valid tender, when he does not say that he will not accept a deed for the property, nor refuse in terms to pay the purchase money, nor say that he cannot make the payment thereof. (p. 915.)

H. B. Eastburn, for the appellants.

W. C. Ryan, for the appellee.

³⁰⁰ **POTTER, J.** This action was brought to recover the balance of the purchase money, on an agreement for the sale of realty. The plaintiffs averred, and the defendant denied, that a sufficient tender of a deed for the property in question was made to the defendant by the authorized representative of the vendor. Under the agreement, the balance of the purchase money was to be paid "on or before the first day of April, 1904, upon execution and delivery of the deed." John Lefferts, a son of the vendor, on April 1, 1904, took a deed of the farm, which had been executed a day or two before, to the residence of the defendant. Not finding him at home, he sought for and found him, later in the afternoon, at the residence of his son. Lefferts said to the defendant that he had come to tell him that ³⁰¹ everything was now ready; that he had brought the deed; that all the liens were cleared off; that they had moved away from the property, and everything was ready for defendant; that they had now performed their part of the agreement, and they wanted the defendant to perform his part. Lefferts admits, however, that he did not produce the deed to defendant, and that it was not shown to him, and of course he did not examine it. The testimony does not show that the defendant, Dolton, refused to take the property; or that he made any statement that he would not comply with the conditions of the sale. Lefferts said merely that he told the defendant that his father, the vendor, had signed the deed, and that he then had it with him in his pocket. Nor does it appear that any demand was made by the representative of the vendor upon the defendant for the payment of the balance of the purchase money at that time, except in so far as it might be inferred from the general statement that Lefferts made to the defendant, when he told him that they wanted him to perform his part of the contract.

We are not able to see in this testimony anything that can properly be construed as a sufficient tender of the deed. The mere statement by Lefferts that he had the deed in his pocket, without producing it to the defendant, and giving him an opportunity to examine it, was not sufficient. Before being called upon to pay his money, the defendant was entitled to see that the conveyance was properly signed, sealed and acknowledged, and that the description of the land to be conveyed was correct. The learned judge of the court below stated the rule accurately when he said that "to constitute a valid tender, a duly executed deed must be produced by the vendor to the vendee, so that the vendee may see that it is regular in form, and that it conveys the estate he bargained for." The vendor in the present case fell short of this requirement. Nor can we see anything in the evidence to support the contention of plaintiffs that the conduct of the defendant amounted to a waiver by him of the tender of the deed. It is true that Dolton did question the fact of the liens having been removed, but he did not say that he would not accept a deed for the property, nor did he refuse in terms to pay the balance of the purchase money. He did not say that ³⁰² he could not make the payment or that he would not. So that in this respect the facts of the present case do not come within the principle of *Herman v. City of Allegheny*, 29 Pitts. L. J. 347, cited by counsel for appellants. We are of opinion that the learned judge of the court below committed no error in entering judgment for the defendant non obstante veredicto.

The assignments of error are dismissed, and the judgment is affirmed.

The Vendor must Prepare and Tender a Deed of conveyance where he covenants to give a title to the purchaser on the payment of the purchase money: *Walling v. Kinnard*, 10 Tex. 508, 60 Am. Dec. 216; and demand the purchase money of the vendee before he can maintain an action for the purchase price: *Smith v. Henry*, 2 Eng. 207, 44 Am. Dec. 540; *Parker v. Johnson*, 20 Johns. 130, 11 Am. Dec. 253.

The Vendee Under a Contract for the sale of lands, having performed his part of the contract, need not tender the vendor's deed for his signature, when the latter has denied the vendee's right to a conveyance under the contract: *Davis v. Robert*, 89 Ala. 402, 18 Am. St. Rep. 126.

FOEHRENBACH v. GERMAN-AMERICAN TITLE AND TRUST COMPANY.

[217 Pa. 331, 66 Atl. 561.]

INSURANCE.—One Already in Possession Claiming to be the Owner when a policy of title insurance issues to him may recover thereon though he expends nothing and hence suffers no loss in reliance on the policy. (pp. 918, 919.)

A POLICY OF TITLE INSURANCE Means the opinion of the company issuing it as to the validity of the title, backed by an agreement to make the title good in case it should prove to be mistaken, and loss should result in consequence to the assured. (p. 919.)

TITLE INSURANCE is Designed to protect the insured, and save him harmless from any loss arising through defects, liens or encumbrances that may be in existence affecting the title when the policy is issued, but it does not protect against any claim arising after the issuance of the policy. (p. 920.)

TITLE INSURANCE—Liability for Partial Failure of.—If a policy issues to one as an owner in severalty, who is afterward adjudged in a suit in partition to hold a moiety only, and he surrenders possession to a purchaser under the decree of sale entered in such suit, he is entitled to recover to the extent to which he is thus adjudged not to be the owner of the whole. (p. 922.)

E. S. Miller and M. G. Belknap, for the appellant.

A. Simpson, Jr., and F. S. Brown, for the appellee.

⁸³³ **POTTER, J.** On September 13, 1894, the plaintiff in this case, under the supposition that he was the owner of the entire interest in a certain property, applied to the defendant for title insurance in the usual form, in the sum of five thousand dollars, against liens or defects in title affecting the premises. On October 12, 1894, the title insurance company issued to applicant its policy, which set forth in part, as follows: "This policy of insurance witnesseth that The German-American Title and Trust Company, in consideration of the payment of expenses and twelve dollars and fifty cents (\$12.50) by way of premium or deposit to it paid by Julius E. Foehrenbach doth hereby covenant that it will indemnify, keep harmless and insure the said Julius E. Foehrenbach and all persons claiming the estate and property hereinafter mentioned under him by descent, by will or under the ⁸³⁴ intestate laws, and all other persons to whom this policy may be transferred with the assent of this company, testified by the signatures of the proper officers of this company indorsed on this policy, against all loss or damage, not exceeding five thousand dollars, which the

said insured shall sustain by reason of defects of the title of the insured to the estate, mortgage or interest described in schedule A, hereto annexed, or because of liens or encumbrances charging the same at the date of this policy. Saving the defects, objections, liens or encumbrances excepted in schedule B, or by the conditions contained in schedule C, and hereby incorporated into this contract."

Schedule A showed that the interest of the insured covered by the policy was as owner in fee. And that the title of the insured was claimed to be vested in him through the will of his mother, Louisa Foehrenbach, dated December 21, 1888, and registered in the appropriate office in Philadelphia in Will Book 144, page 463. Louisa Foehrenbach provided in her will as follows: "I give, devise and bequeath unto my said son John Baker for and during his natural life (after said Julius shall have attained the age of twenty-one years) the property No. 543 East Girard avenue, corner Montgomery avenue, 18th ward, and after his death to his lawful issue, if any, their heirs and assigns; in default of issue the same to vest in my said son Julius Foehrenbach, his heirs and assigns forever."

John Baker, named in the will, died June 23, 1894, intestate, unmarried and without issue, leaving to survive him a half-brother, Julius E. Foehrenbach, and three children of William Ellerich, another half-brother. That William Ellerich bore the same relation to John Baker that he himself did, and that William Ellerich left three surviving children, was known to Julius E. Foehrenbach when he made his application for title insurance but he did not mention these facts to the title insurance company. Presumably, this was because he was acting under the belief that he was, under the will of his mother, the exclusive owner of the property, as there is no suggestion of fraud or bad faith upon the part of plaintiff. Indeed, there could not be, for the will of Louisa Foehrenbach was given by appellant as his immediate source of title, and it was examined and accepted as such by defendant company ³³⁵ as set forth in schedule A, and this will contained a bequest to her son William Ellerich, and made obvious his relationship to the said John Baker. Subsequently, the three children of William Ellerich, claiming a one-half interest in the premises in question, began partition proceedings in the orphans' court. It was there held that John Baker took a fee under the terms of his mother's will, and therefore, at his death his half-brother, Julius Foehrenbach, instead of tak-

ing the entire interest from his mother, took only a half interest from his half-brother, and the remaining half-interest became vested in the children of William Ellerich, the deceased half-brother. The property was then sold under the partition proceedings, realizing the sum of four thousand one hundred dollars, its value, and on distribution of the proceeds of sale one-half the net balance was awarded to the Ellerichs, and one-half to a lien creditor of Foehrenbach. The policy of title insurance had been assigned by Foehrenbach to this lien creditor, and the company paid her the difference between the amount awarded her by the orphans' court and her entire lien, being the sum of four hundred and eleven dollars and eighty-seven cents. On November 21, 1904, Foehrenbach, who had been in possession of the premises since the death of Baker, a period of some ten years, voluntarily delivered possession of them to the purchaser at the partition sale. He then brought this suit in assumpsit against the title company to recover nineteen hundred and fifteen dollars and seventy cents, being the difference between the value of the property, less the amount of the award by the orphans' court, a few small items of credit, and the money paid his assigns.

Defendant filed an affidavit of defense and pleas. A case stated was agreed upon and the cause submitted to the court below, which entered judgment in the following language: "This policy is not a guaranty of title, but a contract of indemnity. The plaintiff has lost nothing. Judgment for defendant on case stated."

In reaching this conclusion the learned court adopted the suggestion of the defendant that the plaintiff lost nothing, because he never did, in fact, have the title to the entire interest, as he supposed he had, and therefore he could not be said to lose that which he had never owned. As a logical statement, taken in the abstract, this is unassailable. But in determining whether or not the failure of his title to the one-half ³³⁶ interest in the property constituted such a loss as would entitle him to indemnity under the terms of his insurance policy, we must examine the contract in the light of the purpose or object for which it was made.

It is admitted that if plaintiff had purchased or improved the property in reliance upon the policy, he could recover. But as he was in possession as owner before he applied for and received the insurance, it is urged that he lost nothing, because he expended nothing in reliance upon the policy. We

cannot see any sound reason for this attempted distinction between the rights of a present and prospective owner, who applies for title insurance. Relief of mind to an owner, obtained through title insurance, is quite as desirable as the same assurance furnished to a prospective purchaser or mortgagee. The sole object of title insurance is to cover possibilities of loss through defects that may cloud or invalidate titles. It is for the assumption of whatever risk there may be, in such connection, that the premium is paid to, and accepted by, the company which issues the policy. Title insurance is not mere guesswork, nor is it a wager. It is based upon careful examination of the muniments of title, and the exercise of judgment by skilled conveyancers.

The quality of title is a matter of opinion, as to which even men learned in the law of real estate may differ. A policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured.

Loss is a relative term. Failure to keep that which one has is loss. The plaintiff in this case, upon September 12, 1894, found himself in possession of a property, devised to him, as he supposed and claimed, in the will of his mother. Wishing to safeguard himself in the enjoyment of his title, he applied to the defendant company for insurance. "Title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specified amount against loss through defects of title to real estate wherein the latter has an interest, either as purchaser or otherwise": Frost on Guaranty Insurance, sec. 162. A contract of title insurance is also defined as "a contract to indemnify against loss through ³³⁷ defects in the title to real estate or liens or encumbrances thereon": 1 Colley on Insurance, 12.

It must be borne in mind that the real subject of insurance is not the concrete thing, but the interest which the one to be indemnified has in the concrete thing. The interest which plaintiff desired to protect was the entire interest as owner in fee of the property in question. It was this interest which he submitted to defendant company as the subject matter of insurance. It was for the company then to examine the evidence of his title, and to say whether or not it would assume the risk of making good to him the injury which would result, in case his claim of title to the entire interest should prove

defective. The contract which he asked for, and which by its policy the company made with him, was one of insurance against defects in the title, as he claimed it to be, and as the company agreed with him after examination that it was, viz., title to the entire interest in the property. The policy applied to the situation as it then existed. It insured the plaintiff against defects, unmarketability, liens and encumbrances as of that date. It said to him, you are in our judgment the owner in fee of the entire interest in this property, and we will back our opinion by agreeing to hold you harmless, up to the amount of the policy, in case for any reason our judgment in this respect should prove to be mistaken.

The risks of title insurance end where the risks of other kinds of insurance begin. Title insurance is designed to protect the insured, and save him harmless from any loss arising through defects, liens or encumbrances that may be in existence, affecting the title when the policy is issued. It does not protect against any claim arising after the issuance of the policy. In the present case the validity of the plaintiff's claim to the entire interest in the property depended upon the construction of the language of the will of Louisa Foehrenbach.

Evidently the defendant company, having the will before it, construed the devise as a life estate in the first taker, and a fee in the remainderman; otherwise, it would not have issued its policy insuring a fee to the remainderman. In adopting this construction, it was mistaken, for when some ten years afterward the question was raised in the orphans' court, ³³⁸ under the partition proceedings, it was decided that the first taker took a fee simple. The title of the plaintiff to the property in question was not, therefore, derived from his mother, as claimed by him in his application for insurance, but whatever interest he had came to him through his half-brother, John Baker, from whom he took only an undivided one-half interest. Can there be any doubt that the reduction of his interest in the property from an ownership of the whole, to that of one-half, was a defect, coming directly within the terms of the policy? No matter whether or not the question of the amount of his interest was doubtful when the policy was issued. The risk of insuring him in his claim of title was one which the defendant could legitimately take if it chose to do so. Insurance carries with it the idea of protection against some risk. If there were no risk, there would be no cause for insurance. The underlying principle of insurance

is the contribution of small sums by a large number of insured, to a common fund from which to indemnify those who actually suffer the loss, which might have fallen upon any of them. Actual loss, of course, must precede the right of compensation. But that is measured by the standard accepted as between the parties. In this case the standard of interest, which was claimed by appellant, was ownership in fee of the entire property. That standard was, after examination of the muniments of title, by the defendant company, admitted as correct, and the policy of insurance was issued, for a proper consideration, agreeing to insure the plaintiff against any loss or damage by reason of defects in that particular interest or claim of title which he had presented to the company. That is, against any outstanding claim which would reduce his interest below that which he claimed it to be. It requires no argument to show that the absolute failure of title to one-half the interest was a serious defect, as compared in extent and quality with the title to the entire interest, which he had asserted and submitted to the defendant company, as the basis upon which the insurance was to be effected, and which was accepted and approved by it, as set forth in the policy.

The estate of interest of the insured which was covered by the policy was that of owner in fee of the entire property. Any defect in title which reduced his interest below that ~~and~~ point was, it seems to us, just that much loss, or damage, for which he was entitled to be indemnified. The fact that an application is made for title insurance by one who, at the time, claims to be the owner, is sufficient of itself to put the insurance company on its guard, and ought to be regarded by it as notice that unusual care should be taken in the examination of the title.

There is no merit in the suggestion that plaintiff is not entitled to recover because he voluntarily gave possession to the purchaser at the sale under the partition proceedings. The sale was made under the decree of the orphans' court, in a suit of which due notice had been given to the defendant company, within the period specified in the policy. It was, therefore, bound by the result. Plaintiff was not bound to carry his resistance to the decree to the point of waiting to be physically expelled from the premises. Proper respect for the court which had made the decree forbade such conduct.

The assignments of error are all sustained.

The judgment of the court below is reversed; and as we are of opinion that the plaintiff was entitled to recover the full amount of the claim, judgment is here entered for plaintiff in the sum of nineteen hundred and fifteen dollars and seventy cents, with interest from November 21, 1904.

Fell and Brown, JJ., dissent.

On the Construction of Title Insurance Policies, see *Place v. St. Paul Title Ins. etc. Co.*, 67 Minn. 126, 64 Am. St. Rep. 404.

LOTZ v. HANLON.

[217 Pa. 339, 66 Atl. 525.]

AUTOMOBILES, Liability of Owner for Injuries Inflicted by.—The Owner of an Automobile is not, Where the Person in Charge was not Using It in the Course of His Employment and in the owner's business, answerable for injuries inflicted by it on a person on the highway. (p. 922.)

AUTOMOBILES.—Evidence of the Ownership of an Automobile at the Time of an Accident does not establish the owner's liability. (p. 923.)

AUTOMOBILES, Liability of Owner for Accident. When not Shown.—Where a person is run down by an automobile in a frequented street of a city, the liability of the owner of the machine is not established by evidence showing his ownership of it, and that it was in charge of and managed by his regularly employed chauffeur, if it also appears that the latter was using his machine without his master's knowledge to entertain friends of such chauffeur, though he had it in his mind in the course of the drive to stop at a store where automobile supplies were sold to purchase some sparks for future use in connection with the machine. (p. 924.)

T. L. Vanderslice and G. A. Swayze, for the appellant.

J. G. Johnson and G. L. Crawford, for the appellee.

³⁴⁰ STEWART, J. It was essential to a recovery in this case that it be made to appear that the accident from which plaintiff's injury resulted occurred while the person in charge of the automobile was using it in the course of his employment, and on his master's business. Plaintiff offered no direct evidence as to this, but having shown the ownership of the machine to be in the defendant, sought to derive from this circumstance, and this alone, not only the fact that the person in charge was defendant's ³⁴¹ servant, but the further

fact that he was at the time engaged on the master's errand. If, when plaintiff rested, a nonsuit had been ordered, he could not have been heard to complain. Ownership of the machine in cases of this character is at best but a scant basis for the inference that was here sought to be derived from it. It is allowed as adequate only when the attending circumstances point to no different conclusion. In itself it is but one of a series of circumstances, and its significance depends on the extent of the general concurrence of these. If they indicate something different, the scant basis that this single fact otherwise might afford is reduced below the point of sufficiency. Because its value as a probatory fact so entirely depends upon attending circumstances, it is always the duty of the party seeking to establish through it a *prima facie* case to develop the whole situation, so that its significance may be correctly measured. When he fails in this regard and his evidence leaves the general situation undisclosed, and this without explanation of the failure, he is liable to suffer from the inference that what was not disclosed was prejudicial to his case. Where this occurs the mere fact of ownership can count for little.

The plaintiff's case discloses nothing more than that the plaintiff had been run down by an automobile in a frequented street in the city, after nightfall; that the machine was at the time occupied by four persons, one being the driver, whose identity was established; and that the machine was registered in the name of defendant as owner. There was absolutely nothing in the evidence to establish the relation of master and servant between the defendant and the driver of the automobile outside the defendant's ownership. It was not even attempted to be shown that the man driving the machine had ever been in defendant's employ in any capacity whatever. The defendant was not identified as one of the party of four in the machine, and not one of the four was called to testify in regard to the matter. The jury had a right to be informed as to who these persons were, where they were going, upon what mission, at whose invitation they were occupying the automobile, and in what relation they stood to the defendant, so that they might intelligently determine the question of defendant's liability. The significance of the ownership of the machine could be measured only as the facts here suggested were disclosed. Had the case gone to the jury, it would have been the duty of the court to instruct, as matter of law,

that no explanation having been given as to why testimony in relation to these circumstances was not produced, the jury might draw the inference that such testimony would be unfavorable to plaintiff's contention. It would be an inference of fact; but in determining whether plaintiff had or had not made out a case warranting a submission, it would be for the court's consideration.

Was this manifest insufficiency of plaintiff's case supplied in any way by the evidence offered on part of the defendant? The evidence establishes the fact that the man driving the machine when the accident occurred was in the defendant's regular employment as chauffeur; that the machine was intrusted to his care and keeping, only, however, for defendant's own use as he might direct. So much is supplied. But it comes to nothing that the driver was the defendant's servant, if it appears that at the time the accident happened he was not on the master's errand or business. If he were on an errand of his own, then as long as so engaged he did not stand in the relation of servant. The evidence on part of the defendant, and not attempted to be contradicted or discredited, leaves it clear of all doubt that the three persons occupying the machine with the driver when the accident occurred were there by invitation of the driver, that they were entire strangers to the owner of the machine, and that the machine was being employed by the driver on this occasion without the knowledge of the owner. We are considering now so much of the evidence offered by the defendant as may be claimed to supplement that offered by the plaintiff, and therefore we may regard the facts as admitted. It shows that without the knowledge of the owner, or of anyone with right to use the machine in absence of the owner from the country, the driver on the morning of the day the accident occurred arranged to take some friends of his own choosing for a drive during the course of the evening. He personally invited a female friend, and through her invited two others, a man and woman, to join the party. He had it in mind to stop in the course of the drive at a store where automobile supplies were³⁴³ sold, to purchase some sparks for future use in connection with the machine. It is clear that this purpose was simply incidental to the evening's trip, and was suggested by consideration of the driver's own convenience. The main purpose of the drive was for the pleasure and enjoyment of the driver and his selected friends. The persons invited by him resided

quite a distance from each other, and in assembling them the driver at the start was obliged to go a considerable distance in the opposite direction from where the supply store was. It was after all were in the machine that the accident happened, but it was while he was at a point farther from the supply store than was his starting point. But had it happened while on the direct route to the store, even though the obtaining of sparks was the main purpose of the drive, this would not have made it an errand on the master's business without some evidence that it was taken with the knowledge and approval of the master. There was not a particle of evidence in the case that the use of the machine for such purpose had ever been allowed by the master. The most that appeared was that the driver had been allowed on some occasions to purchase the necessary supplies for the machine at this store on the master's credit; but none that he had ever used the machine in going to the store to get them, or that he ever employed it in any way except as ordered by the master in connection with each particular occasion. So far as appears, the use of the machine by the driver on the evening when the accident occurred was wholly unlicensed, was for his own convenience and pleasure, and therefore entirely apart from his master's business. The case as exhibited by the plaintiff was insufficient to warrant a recovery; its insufficiency was not supplied by anything shown on the part of the defendant, and it therefore became the duty of the court to direct the verdict.

Judgment affirmed.

The Liability of a Master for the acts of his servant is the subject of a note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71. The test of an employer's liability for the acts of his employé is not whether the employé is using his employer's property when he inflicts the injury, but whether he is representing his employer in the act and scope of his employment: *Sullivan v. Louisville etc. R. R. Co.*, 115 Ky. 447, 103 Am. St. Rep. 330; *Fairbanks v. Boston Storage etc. Co.*, 189 Mass. 419, 109 Am. St. Rep. 646. For the application of this rule to cases where the employé is driving a vehicle, see *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 112 Am. St. Rep. 881; *Sacker v. Waddell*, 98 Md. 43, 103 Am. St. Rep. 374; *McDermott v. American Brewing Co.*, 105 La. 124, 83 Am. St. Rep. 225; *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523.

The Law of the Automobile is the subject of a note to *Christy v. Elliott*, 108 Am. St. Rep. 212.

BICKEL v. PENNSYLVANIA RAILROAD COMPANY.

[217 Pa. 456, 66 Atl. 756.]

RAILROADS—Negligence—Grade Crossing.—It is the duty of employes of a train approaching a crossing to give such signal as will protect the traveler on the highway if he is in the exercise of ordinary care, and it is not a conclusive answer for the railroad company to say that the bell was rung or the whistle sounded in reply to a charge that a train negligently approached a grade crossing, unless it appears that under the circumstances of the case, such signal was sufficient to give timely notice to travelers who were approaching the crossing on the highway. (p. 929.)

RAILROADS—Negligence—Grade Crossings.—At a grade crossing on a railroad, the duties of the company and of the traveler on the highway are reciprocal, and each must approach the crossing with a due regard for the rights of the other, and when either fails to observe the care required, it is negligence for which the guilty party is responsible. Either party will be absolved from the charge of negligence only when he has done what the circumstances of that particular case required a prudent man to do. (p. 930.)

RAILROADS—Negligence—Grade Crossings.—In determining the duty of a person approaching a grade railroad crossing with restive and skittish horses, regard must be had, not only to his conduct under the circumstances, but also that of the railroad company, as to whether or not it gave the proper danger signals. (pp. 930, 931.)

RAILROADS—Crossings—Duty to Stop, Look and Listen—Presumption.—It is the duty of the driver of a team on a highway to stop, look and listen for an approaching train, at a proper place before reaching a grade crossing, and to continue to observe due care to prevent a collision until he has passed entirely beyond the track, but he is presumed to have performed this duty. (p. 932.)

C. G. Derr, for the appellant.

I. Hiester, for the appellee.

458 MESTREZAT, J. This is an action of trespass brought by the plaintiff to recover damages for the death of her husband, who was killed by a collision with the defendant company's train at a grade crossing. In a charge, exceptionally clear and concededly adequate, the learned trial judge submitted the question of the defendant's negligence and the deceased's contributory negligence to the jury, who returned a verdict for the plaintiff. A formal motion for a new trial was made but not pressed, and the learned counsel for the defendant company took a rule upon the plaintiff to show cause why judgment non obstante veredicto should not be entered for the defendant under the act of April 22, 1905 (Pub. Laws, 286). In an exhaustive opinion by the trial judge, he

has reviewed at length the facts as well as the law applicable to the case, and has conclusively demonstrated that there was sufficient evidence to justify the court in submitting the case to the jury. The authorities cited amply sustain his view of the law, and the testimony to which he refers clearly shows that the case could not have been withdrawn from the jury on either of the two questions submitted for their consideration. The defendant company has, therefore, had its case considered twice by an able and thoroughly competent court, who heard the testimony and who dealt with every question which now appears upon this record. So satisfactory to the defendant's counsel was the case disposed of in the court below, that the single complaint in this court is that the trial court erred in not directing a verdict for the defendant, and subsequently, in not entering judgment for the defendant notwithstanding the verdict.

Under the testimony in the case, the defendant's negligence was clearly a question of fact for the jury. And it was made to turn upon the question whether the whistle was blown at ⁴⁵⁹ the whistle-post and the fireman rang the bell for the crossing at which the deceased was killed. The court, on request of defendant's counsel, instructed the jury that "if the defendant's engineman sounded the whistle at the whistle-post and the fireman rang the bell thence to the crossing at which the accident happened, the verdict must be for the defendant." In affirming that point, the learned court surely gave the defendant company all it was entitled to under the facts of the case. Notwithstanding the topography of the country, the character of the crossing and the obstructed view which the deceased had of the approaching train, the learned judge told the jury that the defendant company was relieved from liability if it blew the whistle at the post and rang the bell until the crossing was reached. Under the submission, the verdict establishes the fact that the engineer failed to give the signal at the whistle-post which, by making a rule requiring it, the defendant company shows that it regarded the signal at that place as necessary to protect the public who had occasion to use the crossing. The learned counsel for the defendant company contends that the testimony of its witnesses shows conclusively that the signal was given at the whistle-post, but we think the trial court's analysis of it clearly discloses that the engineer is the only witness who testifies positively that the signal was given. The testimony of

the defendant's other witnesses is clearly open to the doubt and uncertainty which the trial judge points out in his opinion. We think the contradictions of the engineer warranted the jury in disregarding his testimony entirely on that point. Material parts of it are flatly contradicted by other witnesses who were corroborated by certain uncontroverted facts in the case. For the trial court under these circumstances to have instructed the jury that they should believe the testimony of the engineer and disregard all the other testimony in the case as to whether the signal was given at the post or not, would have been manifest error. As we have said, an analysis of all the testimony on this point, of the defendant as well as of the plaintiff, shows that the question was undoubtedly for the jury.

The learned judge, as we have seen, gave the jury positive instructions that if the whistle was sounded at the whistle-post and the fireman rang the bell thence to the crossing, the defendant's ⁴⁶⁰ employes had done their duty, and the defendant company was relieved from liability for the death of the plaintiff's husband. The learned court might have gone further and told the jury broadly that it was the duty of the defendant's employes in charge of the train to have given timely and sufficient warning of its approach to the crossing in view of the circumstances of the case, such as the character of the crossing, the ability of travelers to see an approaching train, the rate of speed of the train, etc., and that, failing to do so, the plaintiff, in the absence of negligence on the part of the deceased, was entitled to recover. While the law does not point out any particular mode or manner in which notice of trains approaching a crossing shall be given, it does require that some suitable and adequate means, adapted to the circumstances, shall be adopted and applied: *Sterrett, J., in Philadelphia etc. R. R. Co. v. Killips*, 88 Pa. 405. In *Ellis v. Lake Shore etc. Ry. Co.*, 138 Pa. 506, 21 Am. St. Rep. 914, 21 Atl. 140, the defendant company submitted several points for instruction, its first point, which was negatived by the trial court, being as follows: "If the jury find from the evidence in this case that the engineer of the defendant company sounded the whistle at a proper distance, and rang the bell as they approached the road crossing, then the defendants have done their whole duty, and are guilty of no negligence, and there can be no recovery in this case." In sustaining this

ruling, this court said (page 519): "We do not think it was error to decline to affirm the defendant's first point. The vice of the point is that it assumed that the railroad company performed its whole duty, provided the whistle was sounded and the bell rung at a proper distance from the crossing. But there was another element in the case which the jury were necessarily compelled to pass upon, viz., the rate of speed at which the train approached the crossing. The character of the crossing itself was a circumstance which could not be ignored, and which necessarily affected the relative duties of both the plaintiff and the company. If it was a dangerous crossing, as was practically admitted on both sides, it was the duty of the plaintiff to exercise the more care in approaching it. At the same time, it was equally the duty of the defendant company to see that their trains passed at a reasonable rate of speed, proportioned to the danger. In other words, negligence ⁴⁶¹ is the absence of care according to the circumstances, and must be measured by the apparent danger." In *Childs v. Pennsylvania R. R. Co.*, 150 Pa. 73, 24 Atl. 341, the court discusses the rate of speed at which a railroad may run its trains in the open country and its duty to give signals in approaching a crossing. It is there said (page 77): "While railroad companies may move their trains at such rate of speed as the character of their machinery and roadbed may make practicable, they must not forget that increased speed for the train means increased danger to those who must cross the tracks, and that increased care on their part to guard against accidents becomes a duty." After referring to the facts of the case, the court continues: "The question suggested by these facts is whether, at such a crossing, and with such a rate of speed, the bell can be heard far enough to be a proper method of giving warning. If it could be heard a quarter of a mile away, it would afford a trifle more than a quarter of a minute for the traveler to determine what to do, and to do it. If the whistle could be heard twice or three times as far, the time afforded the traveler to escape from danger would be twice or three times as great. If, for want of a few additional seconds of time, which another mode of giving warning would have afforded, property or life be destroyed, is it not for the jury to say whether or not the longer warning ought, under the circumstances, to have been given?" In concluding the opinion, the learned judge

says (page 78): "We think there was one question clearly raised by the testimony which was exclusively for the jury, viz., whether a train approaching a crossing, situated like that at Dark Run lane, at a high rate of speed can give sufficient notice of its approach by ringing a bell. If they should find the fact to be that a train moving at the rate of speed at which this train was running would cover the distance between a point from which its bell could be heard at the crossing and the place of crossing, in so short a time as to make the signal of little or no use to one in the act of crossing the track, then the failure to give notice by the whistle from a longer distance away would be negligence."

From these and other cases the rule is established that it is the duty of the employes of a train approaching a crossing to give such signal as will protect the traveler if he is in the exercise ⁴⁶² of ordinary care. It is not a conclusive answer for a railroad company to say that the bell was rung or the whistle was sounded in reply to a charge that a train negligently approached a grade crossing, unless it appears that under the circumstances of the case such signal was sufficient to give timely notice to travelers who were approaching the crossing on the highway. At such crossing, the duties of the company and of the traveler are reciprocal. Each must approach the crossing with a due regard for the rights of the other, and when either fails to observe the care required, it is negligence for which the guilty party is responsible. Either party will only be absolved from the charge of negligence if he has done what the circumstances of that particular case required a prudent man to do.

The question of the contributory negligence of the deceased was likewise for the jury. Here, again, we are met with the testimony of the engineer, but again we are compelled to suggest that his veracity was on trial and was a question for the decision of the jury. "Falsus in uno, falsus in omnibus," is a maxim which applies to the testimony of the engineer. The testimony of some of the other witnesses is wholly irreconcilable with that of the engineer, and hence the duty imposed upon the jury to say whether or not he was mistaken as to the conduct of the deceased and his son when they approached the fatal crossing. In the absence of a similar experience, we cannot determine what our conduct would be if we were within a few yards of a grade crossing with a team of skittish horses,

and an approaching train sounding shrill blasts from its whistle was discovered turning a curve about seven hundred feet distant and traveling toward us at the rate of forty-five miles an hour. Whether we would back the horses, turn them to one side, or attempt to cross the track, or could control the team at all, few men can tell until they are subjected to the perils of such a situation. A judge in his chambers or a lawyer in his office without the experience may surmise what he would do or what another ought to do under those circumstances, but it would simply be a guess on his part, lacking the confirmation of a practical test, and hence without the weight and deference due the finding of twelve intelligent men whose experience in the everyday affairs of life fit them more certainly to judge ⁴⁶³ of what a prudent man would do under such circumstances. Here the deceased and his son were traveling on a highway almost parallel with the railroad, and with their view of an approaching train obstructed by buildings, trees, etc., until they were within about sixty or seventy feet of the crossing, where they could see a train for a distance of about seven hundred and fifty feet. The crossing was approached on a highway about twelve feet wide and of ascending grade. Sixty-seven feet distant from the crossing was a branch of the Reading railroad, which the travelers were required to cross before they reached the defendant's road. The train was traveling at a speed of at least forty-five miles an hour, which would have required possibly about ten seconds for it to have run seven hundred and fifty feet from the place where it could first have been seen by the deceased to the crossing where it struck him. Conceding that the Reading road was seldom used, yet his duty required the deceased not to stop upon it, and hence he was within less than sixty-seven feet from the crossing, and had not more than ten seconds "to determine what to do, and to do it." What a prudent man ought to do under those circumstances was clearly for the jury to say. If a proper signal had been given at the whistle-post thirteen hundred and eighty-seven feet away, the chances are that the deceased and his son would have heard it and that they would not have been placed in this most dangerous position. In determining the duty of the deceased at this time, regard must be had not only to his own conduct, but that of the defendant company. As said in *Bard v. Philadelphia etc. Ry. Co.*, 199 Pa. 94, 48 Atl. 684: "In determining the

negligence of a plaintiff in a case of this character, it is often necessary to consider not only his conduct on the occasion but also that of the defendant. This was at the crossing of a street, where both parties had a right to be. Each party had also the right to act with the belief that the other would exercise his right at the place in the manner and way his duty required him to do. . . . The plaintiff was justified in believing that the defendant's employes would perform their duty in this respect (observe the care required in approaching a grade crossing), and he could act on such belief without any imputation of negligence." The exact distance of the deceased from the crossing at the time he discovered the approaching train is not shown, but he must have been ⁴⁶⁴ very nearly committed to the act of crossing, because his horses were across the defendant company's tracks when the engine struck the wagon "right opposite the seat." Considering the delay caused by the unruly conduct of his horses, as disclosed by the engineer's testimony, the deceased would have had no difficulty in passing the crossing in safety had not the rapid approach of the train and the two shrill blasts from the whistle frightened the horses and made them unmanageable. To a horse unaccustomed to a steam whistle, there is nothing that will frighten it more than the successive blasts of a whistle of a locomotive in the near vicinity. When, therefore, we consider the character of this crossing, the conduct of the defendant company's employes, and the position of the deceased at the moment of his first warning of the approaching train, it is clear that the nature of his conduct on the occasion, whether negligent or otherwise, was under all the circumstances a question for the jury. It unquestionably was his duty to stop, look and listen for an approaching train at a proper place, and to continue to observe, due care to prevent a collision until he had passed entirely beyond the company's track, yet the law presumes, in the absence of evidence to contrary, that this duty was performed. The credibility of the engineer, as well as that of all the other witnesses, was for the jury, and the testimony being sufficient, the learned judge committed no error in submitting the case.

The assignment of error is overruled, and the judgment of the court below is affirmed.

The Law Requires Railroad Companies to give notice of trains approaching a crossing. What such notice shall be will to some ex-

tent depend upon the circumstances of each case, but some suitable means must be adopted and applied which will apprise travelers of the danger of the situation: See *Black v. Bessemer etc. R. R. Co.*, 216 Pa. 173, 116 Am. St. Rep. 766; *Cotton v. Willmar etc. Ry. Co.*, 99 Minn. 366, 116 Am. St. Rep. 422; *Carlson v. Chicago etc. Ry. Co.*, 96 Minn. 504, 113 Am. St. Rep. 655; *Southern Ry. Co. v. Grizzle*, 124 Ga. 735, 110 Am. St. Rep. 191; *Nashville etc. Ry. Co. v. Harris*, 142 Ala. 249, 110 Am. St. Rep. 29; *Louisville etc. R. R. Co. v. Howerton*, 115 Ky. 89, 103 Am. St. Rep. 295; *Mitchell v. Illinois Cent. R. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

STATE v. HURLEY.

[79 Vt. 28, 64 Atl. 78.]

CRIME.—To Constitute an Attempt to Commit a Crime, the act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent, and must reach far enough toward accomplishment of the desired result to amount to the commencement of the consummation. (p. 935.)

CRIME—Attempt to Commit—Jail-breaking.—If a prisoner in jail arranges for procuring saws adapted to jail-breaking, and thereby gets them into his possession with intent to break open the jail and escape, he is not guilty of an attempt to break jail. (p. 937.)

C. Batchelder, state's attorney, for the state.

G. A. Davis, for the respondent.

30 MUNSON, J. The respondent is informed against for attempting to break open the jail in which he was confined by procuring to be delivered into his hands twelve steel hack saws, with an intent to break open the jail therewith. The state's evidence tended to show that in pursuance of an arrangement between the respondent and one Tracy, a former inmate, Tracy attempted to get a bundle of hack saws to the respondent by throwing it to him as he sat behind the bars at an open window, and that the respondent reached through the bars and got the bundle into his hands, but was ordered at that moment by the jailer to drop it, and did so. The court charged in substance that if the respondent arranged for procuring the saws and got them into his possession, with an intent to break open the jail for the purpose of escaping, he was guilty of the offense alleged. The respondent demurred to the information and excepted to the charge.

Bishop defines a criminal attempt to be "an intent to do a particular criminal thing, with an act toward it falling short of the thing intended": 2 Bishop's Criminal Law, sec. 728. The main difficulty in applying this definition lies in determining the relation which the act done must sustain to the completed offense. That relation is more fully indicated in the following definition given by Stephen: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted": Digby's Criminal Law, 33. All acts done in preparation are, in a sense, acts done toward the accomplishment of the thing contemplated. But most authorities certainly hold, and many of them state specifically, that the act must be something more than mere preparation. Acts of preparation, however, may have such proximity to the place where the intended crime is to be committed, and ³¹ such connection with a purpose of present accomplishment, that they will amount to an attempt: See note to *People v. Moran*, 20 Am. St. Rep. 741; *People v. Stites*, 75 Cal. 570, 17 Pac. 693; *People v. Lawton*, 56 Barb. 126.

Various rules have been formulated in elucidating this subject. Some acts toward the commission of the crime are too remote for the law to notice. The act need not be one next preceding that needed to complete the crime. Preparations made at a distance from the place where the offense is to be committed are ordinarily too remote to satisfy the requirement: 1 Bishop's Criminal Law, secs. 759, 762 (4), 763. The preparation must be such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended: 3 Am. & Eng. Ency. of Law, 2d ed., 266, n. 7. The act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent. It must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation: *Hicks v. Commonwealth*, 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024.

But after all that has been said, the application is difficult. One of the best known cases where acts of preparation were held insufficient is *People v. Murray*, 14 Cal. 159, which was an indictment for an attempt to contract an incestuous marriage. There the defendant had eloped with his niece with

the avowed purpose of marrying her, and had taken measures to procure the attendance of a magistrate to perform the ceremony. In disposing of the case, Judge Field said: "Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." ³² Mr. Bishop thinks this case is near the dividing line, and doubts if it will be followed by all courts: 1 Bishop's Criminal Law, sec. 763 (3). Mr. Wharton considers the holding an undue extension of the doctrine that preliminary preparations are insufficient: Wharton's Criminal Law, sec. 181 n. But the case has been cited with approval by courts of high standing.

The exact inquiry presented by the case before us is whether the procurement of the means of committing the offense is to be treated as a preparation for the attempt, or as the attempt itself. In considering this question it must be remembered that there are some acts, preparatory in their character, which the law treats as substantive offenses; for instance, the procuring of tools for the purpose of counterfeiting, and of indecent prints with intent to publish them. Comments upon cases of this character may lead to confusion if not correctly apprehended: Wharton's Criminal Law, sec. 180, and n. 1.

The case of *Griffin v. State*, 26 Ga. 493, cited by the respondent, cannot be accepted as an authority in his favor. There the defendant was charged with attempting to break into a storehouse with intent to steal, by procuring an impression of the key to the lock and preparing from this impression a false key to fit the lock. The section of the Penal Code, upon which the indictment was based, provides for the indictment of anyone who "shall attempt to commit an offense prohibited by law, and in such an attempt shall do any act toward the commission of such offense." The court considered that the General Assembly used the word "attempt" as synonymous with "intend," and that the object of the enactment was to punish "intent," if demonstrated by an act. The court cited *Rex v. Sutton*, 2 Strange, 1074, as a strong authority in support of the indictment. There, the prisoner was convicted ³³ for having in his possession iron stamps, with intent to impress the scepters on sixpences. This was not an indictment for

an attempt, but for the offense of possessing tools for counterfeiting with intent to use them. The Georgia court, by its construction of the statute, relieved itself from the distinction between "attempts" and crimes of procuring or possessing with unlawful intent.

The act in question here is the procuring by a prisoner of tools adapted to jail-breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design.

Exception sustained, judgment and verdict set aside. demurrer sustained, information held insufficient and quashed, and respondent discharged.

To Constitute an Attempt to Commit a Crime, there must be something more than mere intention or preparation. There must be some act moving directly toward the commission of the offense after the preparations are made: *State v. Dovan*, 99 Me. 329, 105 Am. St. Rep. 278; note to *People v. Moran*, 20 Am. St. Rep. 741. As to what constitutes such an act, see *State v. Mitchell*, 170 Mo. 633, 94 Am. St. Rep. 763; *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582; *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741.

IN RE CLARK'S ESTATE.

[79 Vt. 62, 64 Atl. 231.]

APPEAL—"Person Interested."—An Administrator de bonis non directed by the probate court to pay a sum of money to a certain person is "a person interested" in the decree of such court appointing an administrator of the estate of the person to whom such payment is directed to be made, but whom the administrator de bonis non claims is still alive, so that such administrator is entitled to an appeal therefrom. (p. 938.)

APPEAL—"Person Interested."—A "person interested," within the meaning of a statute allowing an appeal from a decree of the probate court, is one who has some legal right, or is under some legal liability, that may be enlarged or diminished by the decree. (p. 939.)

C. B. Tarbell and W. Batchelder, for the appellant.

Stickney, Sargent & Skeels, for the appellee.

⁶³ ROWELL, C. J. This is an appeal from a decree of the probate court for the district of Hartford granting administration on said estate and appointing an administrator thereof. The statute is that "a person interested" in a decree of the probate court "who considers himself injured thereby" may appeal therefrom. The question is whether the appellant has such an interest in said decree that he can appeal therefrom. His interest is that, as administrator de bonis with the will ⁶⁴ annexed of the estate of Silas H. Clark, grandfather of the said George R. Clark, he has in his hands a large amount in money and securities, decreed by the probate court to be paid and delivered by him to the said George as his distributive share of the said Silas' estate.

The record of the probate court shows that the decree appealed from was made on the eighth day of February, 1905, at the verbal request of the heirs of the estate of the said George, late of Waddington, in the county of St. Lawrence and state of New York, deceased intestate, leaving estate in the district of Hartford. The appellant states in his application for an appeal that by diligent inquiry he has not been able to find the said George, to pay to him his said distributive share, and that he believes he was seen alive in 1901 by divers persons named, at divers times and places named, and in 1902 in the state of Montana by another person named; that by diligent search and inquiry he is unable to learn that the said

George has since died; that if he is yet alive, the appellant would have no adequate means of protecting his own interest nor that of his sureties on his administration bond if he should turn over the funds and securities in his hands to the administrator of the estate of the said George; and therefore he prays for an appeal, that the question whether the said George is dead or not may be more fully tried and determined.

The case not coming within the statute for settling the estates of persons absent and unheard from for fifteen years, but standing on the general law authorizing probate courts to settle the estates of deceased persons, if it should turn out that the said George was alive at the time administration was granted on his estate and an administrator appointed, then that grant and appointment would be absolutely null and void from the beginning for all purposes whatsoever, because the probate ⁶⁵ court would be without jurisdiction of the subject matter, and the whole proceeding without due process of law. This is authoritatively settled by *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896, commented upon and explained in *Cunnius v. Reading School District*, 198 U. S. 458, 25 Sup. Ct. Rep. 721, 49 L. ed. 1125.

This being so, it follows that if the appellant should pay the money and deliver the securities in his hands to this administrator, it would be no protection to him against the supposed intestate should he appear and assert his rights. And if he is dead, but died since the grant of this administration, such payment and delivery would be no protection against an administrator appointed since his death.

If this administrator should sue the appellant for the money and the securities, the appellant could deny the plaintiff's representative capacity: *Aldis v. Burdick*, 8 Vt. 21; *Perrin v. Granger*, 33 Vt. 101; 2 *Redfield on Wills*, 107, pl. 5; *Wales v. Willard*, 2 Mass. 120, and cases commented upon in *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, and following.

It would seem, therefore, that he need not wait till he is sued, by which time his evidence may be dissipated, but that he may raise the question in limine by appealing from the appointment, for "a person interested" in a decree, within the meaning of the statute, is one who has some legal right, or is under some legal liability, that may be enlarged or diminished by the decree. This is shown by *Woodward v. Spear*, 10 Vt. 420, and *Hemmenway v. Clark*, 16 Vt. 225, where the appellants had no such interest, but claimed adversely to the

estates. But here the appellant has such an interest and does not claim adversely to the estate, but only questions whether there is an estate, that he may properly protect the funds in⁶⁶ his hands, and save himself, if he can, from a twofold enlargement of his liability in respect of them.

Affirmed and remanded.

Under a Statute Giving the Right of Appeal to any person aggrieved by a probate decree, the only persons who may exercise such right are those who have rights which may be enforced at law, and whose pecuniary interest may be established in whole or in part by the decree: *Briard v. Goodale*, 86 Me. 100, 41 Am. St. Rep. 526. As to the right of an executor or administrator to appeal, see *Sherer v. Sherer*, 93 Me. 210, 74 Am. St. Rep. 339; *Estate of Levy*, 141 Cal. 646, 99 Am. St. Rep. 92.

An Administration on the Estate of a Person supposed to be dead but who in fact is alive is void: *Springer v. Shavender*, 118 N. C. 33, 54 Am. St. Rep. 708; *Carr v. Brown*, 20 R. I. 215, 78 Am. St. Rep. 855; *Clapp v. Houg*, 12 N. Dak. 600, 102 Am. St. Rep. 589; *Selden v. Kennedy*, 104 Va. 826, 113 Am. St. Rep. 1076.

STATE v. ACKERLY.

[79 Vt. 69, 64 Atl. 450.]

BIGAMY—**Belief that Wife is Dead.**—An honest belief, based upon reasonable grounds by a husband that his wife is dead, is no defense to a charge of bigamy, when the second marriage is within the statutory period of seven years' continual absence of such wife out of the state or beyond the seas. (p. 941.)

The respondent Ackerly left his first wife in the fall of 1898 in New Jersey, and down to and including the time of his second marriage in Vermont, on January 9, 1905, he had not known of the existence of his first wife, and supposed her to be dead, according to the information received from a friend in New Jersey in 1901. His first wife never was in the state of Vermont, nor did he know her to be living from the time he left the state of New Jersey in 1898 down to and including the time of his second marriage.

H. S. Jackson, state's attorney, for the state.

J. W. Gordon, for the respondent.

⁷¹ **MUNSON, J.** The charge is bigamy, and the facts are agreed upon. The statute creating the offense provides that

it shall not extend to "a person whose husband or wife has been continually beyond the seas or out of the state for seven years together, the party marrying again not knowing the other to be living within that time": Vt. Stats. 5059. The case presented does not bring the respondent within the exception. It is urged, however, that the statute ought not to be construed to include cases where there is an honest belief in the death of the husband or wife, entertained upon reasonable grounds. This claim is not based upon anything contained in the statute, but on the general proposition that an intention to penalize an act that results from ignorance of fact not due to negligence ought not to be presumed.

There are many statutes in every jurisdiction that make the doing of certain acts criminal, without words bearing upon the knowledge or intent of the doer; and in prosecutions under statutes of this character it is ordinarily held that ignorance of the fact which makes the act criminal is not a defense: See 72 12 Cyc. 148, 157, 158. This rule has been applied in a great variety of cases, from breaches of police regulations to bigamy, adultery and statutory rape: See note to *Farrell v. State*, 30 Am. Rep. 617. It is held, however, in some jurisdictions, that an honest belief, based upon reasonable grounds, is a defense to the charge of bigamy, although the second marriage was within the statutory period: 4 Ency. of Law, 2d ed., 40. But the weight of authority in this country is the other way. The question has not been passed upon in this state, but the action of the court has at least been foreshadowed in cases recently decided: *State v. Hopkins*, 56 Vt. 250; *State v. Wyman*, 59 Vt. 527, 59 Am. Rep. 753, 8 Atl. 900; *State v. Dana*, 59 Vt. 614, 10 Atl. 727; *State v. Tomasi*, 67 Vt. 312, 31 Atl. 780; *State v. Ward*, 75 Vt. 438, 56 Atl. 85. It was claimed in *State v. Tomasi*, 67 Vt. 312, 31 Atl. 780, that ignorance of fact, unaccompanied by negligence, exempts from criminal responsibility. But it was said in that case, and said again in the *Ward* case (75 Vt. 438, 56 Atl. 75), that when a statute makes an act penal, without reference to knowledge, ignorance of the fact is no defense. No ground occurs to us upon which it can be urged that those cases should be distinguished from this.

It is clearly the intent of the statute that one who marries within the seven years shall do so at his peril. There is nothing in the harshness of the provision that justifies a doubt of this intention. The consequences of an invalid marriage to

society and to innocent parties are so serious that the law may well take measures calculated to insure the procurement of the most positive evidences of death before the contracting of another marriage in less than the time fixed.

Judgment that there is no error, and that the respondent take nothing by his exceptions.

The Decision in the Principal Case is supported by *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468; *Russell v. State*, 66 Ark. 185, 74 Am. St. Rep. 78; *Medrano v. State*, 32 Tex. Cr. Rep. 214, 40 Am. St. Rep. 775.

MOWER v. McCARTHY.

[79 Vt. 142, 64 Atl. 578.]

CHATTEL MORTGAGES—Oral Agreement.—If a father loans his son money with which to purchase a stock of goods and establish a business, the son orally agreeing that his father shall be secured by the goods for the original and future loans, such agreement constitutes a valid chattel mortgage as between the parties. (p. 945.)

CHATTEL MORTGAGES—Oral Agreement.—A verbal mortgage of chattels to be subsequently acquired is valid as between the parties. (p. 945.)

CHATTEL MORTGAGES—Possession—After-acquired Property.—If it is stipulated that a chattel mortgagor may sell portions of the mortgaged property from time to time, in the ordinary course of business, and replace that sold with other property of similar kind and value, such after-acquired property on the mortgagee's taking possession of it becomes subject to the lien of the mortgage as of the date thereof. (p. 945.)

CHATTEL MORTGAGES—Bankruptcy—After-acquired Property.—A chattel mortgage on after-acquired property, under which the mortgagee has taken possession with the mortgagor's consent, is valid as against the mortgagor's trustee in bankruptcy in the absence of an express finding that such possession was taken for the purpose of affording a preference, though possession was so acquired within four months prior to the date of the mortgagor's petition in bankruptcy, and with knowledge that the mortgagor was insolvent and contemplating bankruptcy proceedings. (pp. 945, 946.)

CHATTEL MORTGAGES—After-acquired Property.—A chattel mortgage on a stock of goods may be made to cover goods subsequently acquired to replenish the stock. (p. 946.)

CHATTEL MORTGAGES—Bankruptcy—Liens.—The national bankruptcy act providing that where a preference consists of a transfer, the period of four months shall not expire until four months after the date of the recording or registering of the transfer is required, does not apply to a lien given by an oral chattel mortgage. (p. 949.)

CHATTEL MORTGAGES—Right to Possession.—If a father loans money to his son to enable the latter to go into business, and takes an oral chattel mortgage on the stock to be purchased to secure such loan, on the son's failure to repay it, the mortgagee is entitled, as against the mortgagor's creditors, to take possession of the goods, and such possession relates to the time of the execution of the mortgage. (p. 949.)

EVIDENCE—Admissions and Declarations.—If a son makes a common-law mortgage of chattels to his father and thereafter proceeds to obtain all the goods he can without paying for them, with intent to defraud his creditors, the mortgagor's statements showing such intent are inadmissible against the mortgagee, in the absence of evidence tending to connect him therewith. (p. 949.)

EVIDENCE—Conspiracy—Declarations.—If an attempt is made to show a conspiracy, a foundation must first be laid by proof sufficient to establish *prima facie* the fact of the conspiracy, before the admissions of an alleged conspirator can be admitted. (p. 950.)

EVIDENCE—Mortgages—Declarations of Mortgagor.—The mere relation of mortgagor and mortgagee, in the absence of evidence of collusion between them to defraud creditors of the former, does not create such a privity of estate as makes the declarations of one admissible against the other. (p. 950.)

EVIDENCE — Chattel Mortgages — Bankruptcy — Declarations Against Title.—A bankrupt chattel mortgagor's declarations against his title to the property made while it was in his possession and before his bankruptcy, are admissible in evidence against his trustee in bankruptcy. (p. 950.)

E. C. Mower and Powell & Powell, for the plaintiff.

V. A. Bullard and R. E. Brown, for the defendants.

146 TYLER, J. On August 15, 1901, defendant McCarthy loaned his son Arthur \$5,000 with which to purchase a stock of goods and establish a clothing business in Burlington, and afterward loaned him \$2,000 and \$1,000 for the same purpose and took his promissory notes for the several sums. When the \$5,000 was furnished Arthur gave the defendant a verbal mortgage upon the stock that was then to be purchased as security for the repayment of that loan, and of all future loans that should be made, and it was understood between them that the mortgage should include the fixtures in the store and all goods that should be subsequently purchased to replenish or increase the original stock, and that the defendant might, at any time, take possession of the store and goods under his mortgage. Arthur had no capital; he carried on the business with the money loaned him by the defendant from August, 1901, till April, 1903. The defendant and his wife held a lease of the store during the continuance of the

business. ¹⁴⁷ Arthur paid most of the rent and managed the business in all respects as if it were his own.

On April 3, 1903, the defendant by Brodie, a deputy sheriff, took possession of the store, fixtures, and goods by virtue of his mortgage and upon a writ that he sued out against his son. All the notes were then due and nothing had been paid upon them but \$321.82 on the \$1,000 note.

The defendant claimed that he took possession for the purpose of completing his mortgage, and that the property was rightfully in his possession by virtue thereof at the time it was taken from him by the plaintiff in this suit. The plaintiff claimed that the two McCarthys conspired to defraud the merchandise creditors and to obtain all the property for the defendant and thereby for their mutual benefit.

A petition in bankruptcy was filed against Arthur on May 15, 1903, and he was adjudged a bankrupt on June 6th following. He was insolvent at the time of the adjudication and his liabilities were far in excess of his assets.

The present action is replevin in which the plaintiff, as the trustee in bankruptcy of the estate of Arthur, seeks to recover the property described in the writ as belonging to the estate, while the defendant claims it by virtue of his verbal mortgage.

Neither of the McCarthys ever informed any of Arthur's creditors of the verbal mortgage nor of the existence of any lien upon the goods. The creditors had been pressing Arthur for payment before the defendant took possession, and the evidence tended to show that some steps had been taken toward making a sale of the bankrupt's stock and of a pro rata division of the proceeds among the creditors, and that this was with the defendant's knowledge and sanction.

¹⁴⁸ Special verdicts were submitted and the jury found in substance as above stated that by the agreement relative to the verbal mortgage the defendant was to be secured on the goods, furniture and fixtures for the money advanced by him, also upon all goods that might be added to the stock until the advancements were repaid; that he was to have a right to take possession of the mortgaged property whenever he saw fit; that he took possession under his mortgage by his agent Brodie, April 3, 1903; that he was in possession of the mortgaged property when the writ in this suit was served; that \$1,000 worth of the original stock was then on hand; that when the defendant took possession he had reasonable

cause to believe that his son was insolvent, but that he did not have reasonable cause to believe that his thus taking possession was intended by his son to give him a preference over other creditors.

1. The agreement made by the McCarthys constituted a common-law mortgage, which is defined to be an absolute sale of the property by the mortgagor to the mortgagee, subject to be redeemed according to the terms of the contract: *Hutchins v. King*, 1 Wall. 53, 12 L. ed. 544; *Wood v. Dudley*, 8 Vt. 430; *Blodgett v. Blodgett*, 48 Vt. 32. So it was held in *Rice's Assignee v. Hulett*, 63 Vt. 321, 22 Atl. 75, that the giving of security upon chattels, without delivery, is in effect a mortgage at common law and may be valid between the parties, though not in writing: *Jones on Chattel Mortgages*, sec. 2. An unrecorded mortgage is valid between the parties: *Gilbert v. Vail*, 60 Vt. 261, 14 Atl. 542. It is also held that where, as in the present case, it is stipulated that the mortgagor may from time to time sell portions of the mortgaged property and replace it with other property of similar kind and value, and the mortgagee takes possession of it, it is brought under the operation of the mortgage as of ¹⁴⁹ the date thereof: *Peabody v. Landon*, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781. And in *McCloud v. Wakefield*, 70 Vt. 558, 43 Atl. 179, it is held that if there is no stipulation to the contrary, the mortgagee may at any time take possession of the mortgaged property, and that having taken possession of the goods covered by the mortgage but purchased after its execution and delivery, such goods come under its cover and operation as of its date. *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899, 56 Atl. 11, goes to the extent of holding that a chattel mortgage on after-acquired property, under which the mortgagee has taken possession of such property with the mortgagor's consent, is valid against the mortgagor's trustees in bankruptcy, in the absence of an express finding that such possession was taken for the purpose of affording a preference, though possession was so acquired within four months prior to the date of the mortgagor's petition in bankruptcy, and with knowledge that the mortgagor was insolvent and contemplating bankruptcy proceedings. This judgment was affirmed in *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. Rep. 306, 49 L. ed. 577. This was the holding in *Chase v. Denny*, 130 Mass. 566. These

decisions go upon the ground that the mortgagee's title to the after-acquired property relates to the date of the mortgage, and that his taking possession is not the acceptance of a preference but the assertion of a previously acquired right. After the condition of this mortgage had been broken and the mortgagee had taken possession of the mortgaged property, the mortgagor had no interest in the property other than a right to redeem it, and the trustee in bankruptcy had no greater interest therein than the mortgagor.

It must therefore be held that, unless the present case is distinguishable from the recent cases decided by this court, the judgment of the trial court must be affirmed.

¹⁵⁰ The rule of law that one cannot convey property that is not in existence at the time of the conveyance, like fish to be caught in the sea (*Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357), does not apply here. The findings of the jury were that it was understood between the father and son that the former was to be secured on the goods for the money advanced by him, and that this included whatever goods were in the store at the time of the \$5,000 loan and all goods that might thereafter be added to the stock; so it is not made clear whether or not all or any part of the original purchase had then arrived. But assuming that none had arrived when the first loan was made, it was the intent of the parties that the mortgage should attach to the goods when they were placed in the store, and in this respect the goods originally and subsequently purchased stood precisely alike as being subject to the mortgage.

It was held in *Bryan v. Lewis*, Russ. & M. 386, 21 Eng. Com. L. 467, that a sale of goods to be delivered at a future day, when the seller has not the goods nor any contract for them, but expects to go into the market and buy them, is not a valid contract. But this has been overruled in England, and in this country it is the rule that a person may sell chattels of which he is not at the time the owner or possessor: 2 Kent's Commentaries, 13th ed.; 468; 24 Am. & Eng. Ency. of Law, 1043, and notes. A chattel that has ceased to exist or that never had an existence is not the subject of a sale, though an article that has a potential existence, like the natural product or expected increase of property belonging to the seller, may be the subject of an executory contract of sale. But no question is raised in the present case as to the nonexistence of the goods at the time the mortgage was given, for the rea-

son that the mortgagee, by virtue of the agreement and the nonpayment of the notes, took actual possession of the property and was in possession ¹⁵¹ thereof when the petition in bankruptcy was filed: *Peabody v. Landon*, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, and note, 37 S. E. 485.

Matthews v. Hardt, 9 Am. Bank. Rep. 373, is not an authority for the plaintiff, for in that case there was nothing but an agreement to give a lien on property, the parties so treated the transaction, and the lien was not to be enforced until advances to a certain amount had been made: See *Matter of Hunt*, 14 Am. Bank. Rep. 416.

The plaintiff argues that there is nothing in the case to indicate that Arthur could not have sold the entire stock at any time if he had so chosen, and that the case is therefore brought within the rule recognized in *Wilson v. Wallace*, 67 Vt. 646, 32 Atl. 501, that an absolute right in the mortgagor to dispose of the property in one transaction for his own benefit vitiates the mortgage. The exceptions do not show such an agreement between the parties to this mortgage, and from what does appear we think the fair inference is that they intended that Arthur should begin and carry on a retail business in the usual manner, keeping up the stock; and he did so conduct the business for a year and a half from August 3, 1901.

2. The plaintiff further contends that notwithstanding the finding by the jury that the defendant did not have reasonable cause to believe that his taking possession was intended by his son to give him a preference over the other creditors, the transaction was voidable under the bankruptcy act. *Peabody v. Landon* is reported in 15 Am. St. Rep. 903, with full notes by Mr. Freeman, wherein he speaks of the wide difference in judicial opinions upon this subject, and gives his own opinion that the weight of reason is with those who maintain that such a mortgage as the one here under consideration, with like agreements contemporaneously made, is fraudulent and ¹⁵² void as to subsequent purchasers or creditors of the mortgagor; but he says that it is for each state to adopt that line of decisions which best accords with its own views of public policy and seems to its judges to be best sustained by reason and authority: See *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. Rep. 567, 49 L. ed. 956, 184 Mass. 361, 100 Am. St. Rep. 562, 68 N. E. 844, 63 L. R. A. 738. The writer cites numerous authorities in support of his view, and a "respect-

able number" which decide that it cannot be held as matter of law by the court that such a mortgage is fraudulent and void, but that it is for the jury to determine as a question of fact. He cites among other cases *Lister v. Simpson*, 38 N. J. Eq. 438, where the court closed an able opinion by saying that the mere fact that a mortgagor retains possession and uses the mortgaged chattels has never been accepted in that state as conclusive and unanswerable evidence of fraud.

The plaintiff cites many cases from the Am. Bank. Rep. which hold that where a debtor is insolvent within the meaning of the bankruptcy act and the creditor has knowledge of the insolvency, or has such information as would put a prudent man upon inquiry, and receives a payment, it follows as a necessary inference that he had reasonable cause to believe that it was intended as a preference: *Pepperdine v. National Exchange Bank*, 10 Am. Bank. Rep. 570, Missouri court of appeals, which states this rule with much force. The New Hampshire cases cited by the plaintiff disfavor such agreements, calling them secret trusts.

Tatman v. Humphreys, 184 Mass. 361, 100 Am. St. Rep. 562, 68 N. E. 844, 63 L. R. A. 738, is an authority for the plaintiff, for it is there held that the preference created by the mortgagee taking possession of the mortgaged property under an unrecorded mortgage, within the four months' period, dates from the acquisition of possession under the mortgage. Knowlton, C. J., remarked in his opinion that, "the reason¹⁵³ for the enactment, as it is interpreted, is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in bankruptcy, made a statement to certain of his creditors and to commercial agencies that there was no encumbrance on his stock or fixtures—a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's bankruptcy, could take all the debtor's property, and leave nothing for the other creditors who had trusted him because of his possessions." *Clayton v. Exchange Bank of Macon*, 10 Am. Bank. Rep. 183 (U. S. C. C. A., Fifth Circuit), is like the Massachusetts case in its facts and in the statement of the law by the court. But *Tatman v. Humphrey*, 184 Mass. 361, 100 Am. St. Rep. 562, 68 N. E. 844, 63 L. R. A. 738, was reversed in *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. Rep. 567, 49 L. ed. 956.

3. The plaintiff also contends that the case falls within the amendments of 1905 to section 60a, which is: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required"; but this obviously relates to written chattel mortgages which are required by law to be recorded; therefore the amendment does not control here.

In this case, upon the findings of the jury, there was no actual fraud. All the money that went into the purchase of these goods was the defendant's. Upon the failure of his son to repay the loans, the defendant had the right to take possession of the goods and preclude the creditors from sharing in the proceeds of their sale, and his taking possession related to the time of the agreement. This has been the holding of this court in former cases, and we find no occasion to ¹⁵⁴ depart from it, although the courts in many of the states maintain a different doctrine, as has been shown.

4. The plaintiff contends that there was error in the admission and exclusion of evidence. The plaintiff claimed in the court below, and claims here, that the original agreement between the McCarthys was fraudulent; that they conspired to defraud the jobbers, who sold goods to Arthur, by obtaining them for the mutual benefit of the father and son. The conceded facts show that the agreement was in effect a common-law mortgage, yet the plaintiff might show by competent evidence that the business was carried on by Arthur with a purpose to obtain all the goods he could without paying for them, and then have his father take possession of them upon his mortgage. It was in this view that the false statements made by Arthur to his creditors were offered. Those statements and the fact that Arthur, after his father took possession, removed \$2,500 worth of goods from the store in the night-time, and stored them in another town, show his intention to defraud his creditors. If the action were against him, these statements would have been admissible in proof of his fraud; but the action is against his father, and there was no evidence offered that tended to connect the defendant with these statements. Indeed, the court said in ruling them out, that if any evidence should afterward be offered tending to connect the defendant with them the offer of them in evidence might be renewed. As such evidence was not produced, the statements could not have affected the

defendant's liability any more than the evidence of Arthur's removing a part of the goods from the store without the defendant's knowledge. It is also a well-settled rule, where an attempt is made to show conspiracy, that a foundation must first be laid by proof sufficient in the opinion of the trial court to establish *prima facie* the fact of ¹⁵⁵ conspiracy between the parties, or proper to be laid before the jury as tending to establish such conspiracy before admissions of an alleged co-conspirator can be admitted: 1 Greenleaf on Evidence, sec. 3. The exceptions show that the necessary foundation was not laid in this case.

5. The mere relation of mortgagor and mortgagee, in the absence of evidence of collusion between them to defraud the creditors of the former, did not create such a privity of estate as entitled the plaintiff to use the declarations of one against the other. There was nothing suspicious or unusual in the conduct of the defendant. He had loaned his son \$8,000, upon his note, secured by what we hold was a valid mortgage. He learned that his son was in debt and, insolvent, and, by virtue of the agreement, he took possession of the goods and fixtures. He does not claim under a right acquired subsequent to his son's declarations, but under a prior right, and when he exercised that right by taking possession, his title dated back to the time of making the mortgage.

It must be seen that if the statements had been received in evidence, the jury could have made no legitimate use of them as affecting the defendant's liability, for no relation was shown to exist between him and his son that made the declarations of the latter evidence against him.

6. The testimony of Donlan was that he was told by Arthur, soon after the business was undertaken, that the defendant had loaned him five or six thousand dollars to go into business with, and that the defendant was to have the right at any time to take possession of the property. This evidence was admissible, for the reason that the plaintiff, as trustee, was successor to all rights of property that Arthur possessed, and that he must recover through Arthur's title. It was held in *Alger v. Andrews*, 47 Vt. 238, that the declarations ¹⁵⁶ of one against his title to property, made while in his possession and before he assigned it to the defendants, were admissible against the defendants: See *Bucklin v. Beals*, 38 Vt. 653; *Davis v. Windsor Sav. Bank*, 48 Vt. 532. This admission stands upon opposite ground from that upon which Arthur's

statements to his creditors were offered in evidence. They were in support of the plaintiff's claim of title, while this admission makes against that claim and against the plaintiff's interest.

There was no error in the rulings. Judgment affirmed.

An Equitable Chattel Mortgage may rest in parol: *Davis v. Childers*, 45 S. C. 133, 55 Am. St. Rep. 757.

Mortgages of Property to be Afterward Acquired are discussed in the note to *Burrill v. Whitcomb*, 109 Am. St. Rep. 510. A chattel mortgage, otherwise valid, is not rendered void because it professes to include property that may be acquired subsequently: *Skilton v. Codington*, 185 N. Y. 80, 113 Am. St. Rep. 885.

The Validity of Chattel Mortgages allowing the mortgagor to remain in possession and sell the goods is discussed in the note to *Peabody v. Langdon*, 15 Am. St. Rep. 912. The fact that a chattel mortgage permits the mortgagor to sell the chattels and apply the proceeds in payment of the mortgage does not render the mortgage void: *Skilton v. Codington*, 185 N. Y. 80, 113 Am. St. Rep. 885.

Bankruptcy.—If the Holder of an Unrecorded Chattel Mortgage, executed two years before the bankruptcy of the mortgagor and while he was solvent, first takes possession under his mortgage three weeks before the mortgagor files his petition in bankruptcy, he being insolvent at the time, and the mortgagee having reasonable cause to believe him insolvent, it has been held that the transfer dates from the time the mortgagee takes possession, and is voidable as an unlawful preference under the bankruptcy act: *Tatman v. Humphrey*, 184 Mass. 361, 100 Am. St. Rep. 562.

ORDWAY v. FARROW.

[79 Vt. 192, 64 Atl. 1116.]

DEEDS—Mortgage Back to Secure Purchase Money.—If the owner of land conveys the timber thereon on condition that the deed shall be void unless the grantee pays a purchase money note at maturity and removes the timber within a specified time, the deed creates a relation in legal effect the same as in the case of conveyance of absolute title with a mortgage back to secure the purchase price. (pp. 953, 954.)

CONVEYANCE OF TIMBER—Condition Broken—Redemption Rights.—If the owner of land conveys the timber thereon on condition that the deed shall be void unless the grantee pays a purchase money note at maturity and removes the timber within a specified time, and the grantee fails to pay the note at maturity, and before the expiration of the time for the removal of the timber the grantor sues the grantee in trespass for removing timber after the maturity of the note, and recovers judgment, such judgment and the contesting of the action do not bar the equitable right of the

mortgagor to redeem. The equitable right to redeem could neither be heard nor determined in the action of trespass. (p. 954.)

CONVEYANCE OF TIMBER—Breach of Condition—Equitable Relief.—If the owner of land conveys the timber thereon on condition that the deed shall be void, unless the grantee pays a purchase money note at maturity and removes the timber within a specified time, and he fails to pay such note, and upon a claim of forfeiture made by the grantor before the expiration of the time for the removal of the timber, the grantee tenders the amount of the note which is refused, and, in an action for trespass the grantor obtains judgment against the grantee, the grantor retaining possession, except to the extent necessary for the purposes of the conveyance, the grantee may maintain a suit to compel the grantor to accept the tender and for redemption, and in such case the grantor is in the position of a mortgagee holding adversely to the rights of the mortgagor, and though the time limit for the removal of the timber has expired the grantee is entitled to a reasonable time in which to remove it. (p. 955.)

MORTGAGES—Equitable Relief—Right of Redemption.—Although at law the legal estate becomes absolutely vested in the mortgagee upon default, in equity the mortgage is a mere security for the debt, and only a chattel interest and, until a decree of foreclosure, the mortgagor remains the real owner of the fee. The legal title vests in the mortgagee merely for the protection of his interest, and in order to give him the full benefit of the security, but for no other purpose, and after default the mortgagee has a right to redeem, which may be enforced in equity. (pp. 955, 956.)

MORTGAGES—Tender—Interest.—If a mortgagor does not pay or tender the amount of the mortgage note on the day of its maturity, and the mortgagee thereafter refuses a proper tender, he is not entitled to interest after the tender is made. (p. 960.)

INJUNCTION—Restraining Action at Law.—If the owner of land conveys the timber thereon on condition that the deed shall be void unless the grantee pays a note for the purchase price at maturity, and upon failure of the grantee to pay the note, the grantor obtains a judgment against him in trespass, but in a suit in equity by the grantee, it appears that he is entitled to redeem, the conveyance constituting a mortgage, equity has jurisdiction to restrain any action under the judgment obtained in the action of the trespass. (p. 960.)

Besides the facts stated in the opinion, the master found the following facts:

“On November 3, 1900, by a verbal agreement, the orator agreed to buy, and the defendant agreed to sell to him, the standing timber on a certain lot in Walden, Vermont, for one hundred dollars, and the orator then paid the defendant five dollars on the purchase price, and took from him a receipt reciting that fact. The orator had no great financial means, and he expected to cut and manufacture the timber on this and other lots, and sell the same, and from the proceeds to pay the defendant, and the defendant understood this. On December 6, 1900, the orator gave defendant his six months' promissory

note for ninety-five dollars, the remainder of the purchase money. To this note was attached the following written memorandum signed by the orator:

“ ‘The above note is given for the balance of the purchase money for the standing timber on what is known as the Fletcher lot lying and situated at the north of Coles Pond in Walden, Vt. Said lot now belonging to said Israel T. Farrow, Jr. Said timber is to be and remain the property of said Israel T. Farrow, Jr., till above note and interest are paid in full.’

“ ‘After the above note was given, defendant was informed that such a note would not serve to hold the timber on the lot, and on December 17, 1900, he executed and delivered to the orator a deed, dated December 6, 1900, conveying to him the timber on said lot. This deed was conditioned as follows:

“ ‘The condition of this deed is such that the said R. A. Ordway, his heirs or assigns, shall well and truly pay or cause to be paid the said I. T. Farrow, Jr., his heirs or assigns, one promissory note of even date herewith, for the sum of \$95, payable six months from date to Israel T. Farrow, Jr., with interest from date, and signed by said R. A. Ordway, and shall remove said timber within three years, then this deed shall remain in full force and effect, but otherwise this deed to be null and void.’

“ ‘The orator took possession of the lot by doing some cutting thereon before December 6, 1900, and erected his mill near by, but it did not get into operation so soon as he expected, although he used reasonable efforts to do so, and in consequence he did not get the timber from the lot manufactured and sold so as to pay the note when it became due, July 6, 1901. On August 29, 1901, the parties met, and defendant then for the first time claimed that the orator had forfeited all his rights to the timber because he had not paid the note at its maturity, and forbade him to cut any more timber. Then followed the tender and the two suits mentioned in the opinion.’”

J. P. Lamson, for the plaintiff.

Porter & Thompson, for the defendant.

¹⁹⁶ WATSON, J. By the defendant's conveyance of the timber, an estate was created and vested in the orator, the continuance of which depended upon the performance of the condi-

tions, first, to pay the note described in the deed, and, secondly, to ¹⁹⁷ remove the timber within three years. These are conditions subsequent (Shepherd's Touchstone, 117; 4 Kent's Commentaries, 125), and, exclusive of the second, the relation created between the parties does not differ in legal effect from the ordinary case of conveyance of absolute title with mortgage back to secure a portion of the purchase money: Moulthrop v. Farmers' Mut. Fire Ins. Co., 52 Vt. 123; Ford v. Steele, 54 Vt. 562.

So far, the case is like a common action in equity to redeem. Standing thus, the right of redemption is too clear to necessitate the citation of authorities. It is contended, however, that this right is barred by the judgment in the first suit at law. But that action was trespass and trover for cutting down and converting the timber, and the judgment was in damages for the stumpage value of the lumber cut after the legal title, by nonpayment of the mortgage debt, became absolute in the defendant as mortgagee. The question of the equitable right of redemption could neither be heard nor determined in that action. Consequently, this right can be barred neither by contesting the suit nor by the judgment.

It is said that redemption cannot avail the orator except he be granted time in which to remove the timber beyond the contractual limitation which has expired. Hereon it is argued that the exercise by the defendant of his legal right to bring suits at law against the orator should not afford the latter an excuse for the nonperformance of the condition in respect to the time in which the timber should be removed; and that the defendant should not be required to give further time, thereby having forced upon him a contract to which he never subscribed or assented. But upon the facts found this is no answer to the orator's claim for relief in equity. Notwithstanding the note was overdue and so the law-day of the mortgage passed, the orator had the equitable right to redeem by paying the sum ¹⁹⁸ due with interest, which right the defendant was bound to respect.

On September 11, 1901, when the mortgage note was some more than three months overdue, and before any suit had been brought, the orator tendered to the defendant the amount then due, which the defendant refused to receive, claiming that he had sold the timber too cheap and did not want the pay, but wanted the property back, and that the orator had forfeited all right to it. And he claimed at the hearing be-

fore the master that the reason he did not accept the tender was because the timber had advanced in value, that he sold it too cheap, and wanted it back, with pay for the stumpage of that which had been cut. The tender has been kept good. In equity ever after the tender was made, the defendant, and not the orator, was in default. Yet on June 26, 1902, the defendant brought his suit at law against the orator for trespass upon the freehold in cutting the timber, with a count in trover for a subsequent conversion of the timber cut. Pending that suit in the county court, and on November 20, 1901, the defendant by his attorneys notified the orator in writing not to cut any more logs or lumber on the lot in question, and not to sell or remove from the orator's millyard any of the logs or boards which had previously been cut on the lot, as the defendant claimed them all. The defendant prosecuted the suit to judgment in his favor at the following December term of county court. Exceptions were taken by the orator and the cause passed to this court, where it is still pending. On July 24, 1903, the defendant brought another suit at law for trespass on the lot after the date of the writ in the first suit. This second action was pending at the time this bill was brought and is yet. The orator continued to cut timber until the trial of the first case in the county court, since which time he has done ~~no~~ no cutting. The time limited by the deed for removing the timber expired December 17, 1903. The master finds that there is now upon the lot two hundred thousand feet or more of timber which has not been cut, but which would have been cut by the orator within the time limited if the trespass suits had not been brought.

It is true, as urged in argument, that after forfeiture by default of payment at the time appointed, and after the tender was made, the legal estate was in the defendant and he had a legal right to bring and prosecute the suits at law. Nevertheless, the forfeiture consequent on such default was designed merely as security for the enforcement of the obligation secured by the mortgage, and well-settled principles of equity required that it be not perverted to a different and oppressive purpose. "Where a penalty or a forfeiture," says Mr. Justice Story, "is designed merely as security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds

upon the ground that a party, having a legal right, shall not be permitted to avail himself of it for the purpose of injustice, or fraud or oppression, or harsh and vindictive injury": 2 Story's Equity Jurisprudence, sec. 1316.

The principles here enunciated apply with great force to the case in hand. Although at law the legal estate became absolutely vested in the mortgagee upon default, in equity the mortgage is a mere security for the debt, and only a chattel interest, and until a decree of foreclosure, the mortgagor continues the real owner of the fee. The legal title vests in the mortgagee merely for the protection of his interest, and in order to give him the full benefit of the security; but for other ²⁰⁰ purposes the mortgage is a mere security for the debt, and since default the mortgagor has had a right to redeem, which may be enforced in equity. "A mortgage is one thing at law and another in equity; in the one court it is an estate, and in the other a security only. . . . Courts of law have so far adopted the principles of equity that they allow the legal title of the holder of the mortgage to be used only for the purpose of securing his equitable rights under it": 1 Jones on Mortgages, sec. 11; 4 Kent's Commentaries, 11th ed., 173-177; Barrett v. Sargeant, 18 Vt. 365; Hooper v. Wilson, 12 Vt. 695. Lord Eldon said at law a mortgagee is under no obligation to reconvey after the particular day of limitation, yet a court of equity says that though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon the ground that the contract is considered in equity as a mere loan of money, secured by a pledge of the estate; that the agreement does not import at law once a mortgage, always a mortgage, but equity says that: Seton v. Slade, 7 Ves. 265.

Before forfeiture on the mortgage, the orator was in possession of the lot to the extent necessary for the purpose of his grant. Other than this, the possession remained in the defendant, as owner of the fee. Regularly when a grantee will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make claim, for the reason that a freehold and inheritance shall not cease without entry or claim. But if the grantor is himself in possession of the premises when the breach happens, the estate revests in him at once without any formal act on his part, and he will be presumed, after breach, to hold for the purpose of enforcing the forfeiture unless he waive the breach, which he may do:

Coke's Littleton 218a; 1 Washburn on Real Property, *452. The conditional ²⁰¹ estate was so related to the fee that actual entry could not be made. Whether in the circumstances it was necessary for the defendant to make claim in consequence of the breach, we need not consider; for if the defendant's possession of the fee was equivalent to his re-entry, it was sufficient in law; and in case a claim be necessary, it was made when the defendant asserted a forfeiture and forbade the orator's cutting more timber. Let it be either way, an equivalent to a re-entry was had, and thenceforth the possession was in the defendant. But his possession has been in a sense in trust for the orator. Lord Hardwicke said: "It is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, videlicet, with regard to the inheritance he certainly is, till foreclosure": *Casborne v. Scarfe*, 1 Atk. 603. See, also, *Dobson v. Land*, 8 Hare, 216; *Amhurst v. Dawling*, 2 Vern. 401.

It clearly appears from the facts found that the suits at law were not brought either to enforce or protect the security. No occasion existed to bring them for such purpose, for the full amount of the mortgage note had been tendered the defendant, the tender had been kept good, and the money was subject to his call whenever he saw fit to take it. The refusal of the tender on the grounds stated, and the defendant's subsequent actions in claiming absolute ownership of the lumber with notice to the orator to cut no more logs on the lot, in bringing the suits for trespass on the freehold and obtaining judgment for damages in cutting timber after the tender was made, place the defendant in the position of a mortgagee in possession holding adversely to the equitable rights of the mortgagor, rather than in recognition of them, or in any sense in trust for him. In view of the condition in the deed making the orator's estate defeasible if the timber be not removed within the time specified, such adverse holding by the defendant ²⁰² was inequitable, oppressive, and in derogation of the orator's rights in that respect. It is laid down by Sheppard that if a feoffer, after a feoffment of land made upon condition, enter and hold the possession only, by this the condition is suspended during his possession; and if he hold the possession so long that the feoffee cannot perform the condition, the condition is discharged forever: 1 Shepherd's Touchstone, *158.

Moreover, by the refusal of the tender and the retention of the legal title consequent thereon, the cutting of more timber by the orator was made unlawful. This was established by the judgment against him in the suit at law for trespass in entering upon the land for that purpose, upon the recovery of which he ceased cutting. The removal of the timber within the time limited was therefore made impossible by the unconscionable actions of the defendant. "We can do that only which we can lawfully do" is a maxim here applicable. It is a general rule of the common law that if the condition subsequent be possible at the time when it was created, and becomes afterward impossible by the act of the grantor, the estate of the grantee, being once vested, is not thereby divested, but becomes absolute. After stating this rule, it is said by Lord Coke, by way of illustration: "If a man make a feoffment in fee upon condition that the feoffee shall re-enfeoffe him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for nonperformance thereof. And so it is if A be bound to B that I. S. shall marry Jane G. before such a day, and before the day B marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly ²⁰³ true in all cases": Coke's Littleton, 206b. Upon the same doctrine Bacon says: "So, if a condition be to repair a house, he is excused thereof, if a stranger, by the command of the obligee himself, disturbs him, and will not suffer him to do it": Bacon's Abridgment, tit. "Conditions," (Q) 3. In 2 Greenleaf's Cruise, title 13, chapter 2, sections 21, 22, the same rule is laid down, with a statement of the holding in *Darley v. Langworthy*, 3 Bro. P. C. 359, where Vincent Darley devised his estate, called Battins, to his sister for life. He also gave her the rents and profits of all his chattel estates for so many years as she should live, and she should choose to reside at Battins. The devise of the estate of Battins was afterward revoked by the testator. It was held that the devisee was entitled to the benefit of the chattel estates, discharged from the condition of living at Battins, which the revocation had put out of her power. Lord Comyns says that he who prevents the performance of a condition cannot avail himself of the non-performance: Comyn's Digest, tit. "Condition," L. 6. See,

also, Bacon's Abridgment, (o) 3; 4 Kent's Commentaries, 130; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; United States v. Arrendono, 6 Pet. 691, 8 L. ed. 547; Whitney v. Spencer, 4 Cow. 39.

The application of the above rule at law, without modification, to the case before us would give the orator an unconditional title to the standing timber with no limitation as to time for its removal, other than that implied by law, an estate not contemplated by the parties and one which might work injustice to the defendant. The orator's estate created by contract was conditioned upon the removal of the timber, and its character in this respect will not be changed by a court of equity. But since the orator was prevented by the defendant from performing within the time limited, he will be relieved in equity from the forfeiture consequent thereon, and as far as ²⁰⁴ circumstances will admit, the parties will be restored to their original position under the contract. To this end equity will regard the condition as without any specified time in which the timber should be removed. And where no particular time is specified in which the condition shall be performed, the rule is that the performance must be within a reasonable time, according to the nature of the thing to be done: Comyn's Digest, tit. "Condition," G. 5. In Davis v. Gray, 16 Wall. 203, 21 L. ed. 447, the nonperformance of conditions subsequent within the time fixed because prevented by the state was involved, and similar relief was granted in equity: See, also, Battell v. Matot, 58 Vt. 271, 5 Atl. 479. What will constitute a reasonable time in the circumstances of the case, however, will be left for the court of chancery to determine. No question is made but that the bill is sufficient for this purpose.

The question arises as to what effect the tender and its refusal have on the right of the defendant to subsequent interest. In England, by a custom which, as affecting the claim for interest, has the force of law, a mortgagee whose money is not paid on the day appointed is entitled to six months' notice from the mortgagor of his intention to pay off the mortgage, unless it be paid pursuant to a demand by the mortgagee, or an agreement entered into that it should be paid on a particular day. Consequently, a tender before the expiration of the six months will not stop the running of interest during that time. The foundation of this custom seems to be that since redemption is a matter of equity only, a person seeking to redeem should do equity by allowing the mortgagee

a reasonable opportunity to find other security on which to invest his money when he receives it: 2 Spence's Equity, 651; Browne v. Lockhart, 10 Sim. 421; Jones on Mortgages, sec. 1071.

²⁰⁵ But it is said by Mr. Jones that there is no such rule or custom in this country: Jones on Mortgages, secs. 890, 1071. Certainly none obtains in this state. Notwithstanding the money was not paid or tendered on the day appointed, the orator had the right to redeem by payment or tender of payment subsequent thereto and at the time when he in fact made the tender, and the defendant should have accepted it. The defendant refused to receive the money, and since that time he has been wholly in default—the basis of his refusal is inequitable and unjust. In these circumstances he cannot in conscience have interest after the tender was made: Blodgett v. Blodgett, 48 Vt. 32; 2 Spence's Equity, 651; Manning v. Burges, Freem. Ch. 174; Lutton v. Rodd, 2 Ch. Cas. 206; Wiltshire v. Smith, 3 Atk. 89.

Enough has already been said touching the purpose and effect of the suits at law to show that defendant should not be allowed to prosecute them further, or to avail himself of any advantage gained by them. "The court interferes on the principle of preventing a legal right from being enforced in an inequitable manner or for an inequitable purpose": Seton's Forms of Decrees, 1st Am. ed., 161. It is laid down as a general proposition "that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is, therefore, against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained. . . . If any such unfair advantage has been already obtained by proceedings at law to a judgment, it will, in like manner, control the judgment, and restore the injured party to his original rights": 2 Story's Equity Jurisprudence, sec. 885; Taylor v. Gilman, 25 Vt. 411.

Decree reversed and cause remanded with mandate.

Conditions Subsequent are considered with reference to what words constitute them in the note to Ecroyd v. Coggershall, 79 Am. St. Rep. 747. The mode of taking advantage of breaches of conditions subsequent is discussed in the note to Trustees of Union College v. New York, 93 Am. St. Rep. 572. Conditions precedent are discussed in the note to Brennan v. Brennan, 102 Am. St. Rep. 366.

A Mortgage is a Mere Security for a debt. It is a chattel interest, and the mortgagor continues the real owner of the fee: *Killebrew v. Hines*, 104 N. C. 182, 17 Am. St. Rep. 672.

The Equity of Redemption is a creature of the courts of chancery, and is impliedly reserved by the mortgagor. This reserved estate belongs to the mortgagor, is regarded as an estate distinct from the right vested in the mortgagee, and is indefinite in its duration: *Beverly v. Barnitz*, 55 Kan. 466, 49 Am. St. Rep. 257.

THORP v. CROTO.

[79 Vt. 390, 65 Atl. 562.]

MORTGAGES—Application of Insurance Proceeds.—A mortgagee receiving money on a fire insurance policy procured by the mortgagor for his benefit must, in the absence of any direction by the mortgagor, hold such money until some part of the mortgage debt or interest thereon is due, and thereafter apply it as fast as the debt falls due, and no faster. (p. 962.)

Brown & Hopkins, for the petitioner.

C. G. Austin & Sons, for the defendant.

³⁹¹ MILES, J. The question raised in this case is, Must the mortgagee receiving money on a fire insurance policy procured by the mortgagor for his benefit hold that money until some part of the mortgage debt is due and thereafter apply it as fast as it falls due and no faster?

At the time the money was received by the mortgagee no part of the principal nor interest was then due upon the mortgage indebtedness, which then consisted of six promissory notes of two hundred dollars each, bearing date November 16, 1901, and made payable six, seven, eight, nine, ten, and ³⁹² eleven years from date, with interest annually from January 1, 1902. At the time this money was received by the mortgagee he indorsed it as a payment upon the note first falling due, to the extent of two hundred dollars, thereby extinguishing the principal of that note, if treated as a payment, and leaving due thereon only the interest which had accrued upon it to that date, the first year's interest on all the notes having been paid previous to the receipt of the insurance money by the mortgagee. The balance of the money the mortgagee indorsed generally upon the note next falling due. No direction was given by the defendant mortgagor to the orator as to

what disposition he desired to have made of that money until some time after the application had been made. His contention now is, that as no part of the debt was due at the time the money was received, the orator had no right to indorse it upon the debt without his consent until some part of it fell due. It is undoubtedly true that such is the law, and the court are all agreed that money so received cannot be applied as a payment upon the mortgage debt, if no part is due at the time of application, without the consent of the mortgagor, and a majority of the court hold that when the debt does fall due, the mortgagee not only may, but must, apply the money to the extinguishment of the debt as fast as the same falls due; that the mortgagee holds such money for the payment of the debt, and the application must be made as the law requires in cases where money is received on a pledge. In *Lewis v. Jewett*, 51 Vt. 378 which was a suit upon two notes against the defendant, secured by the pledge of other notes on which was received a sum of money during the pendency of the suit, it was said by the court, Ross, J., delivering the opinion: "When the sum came into the plaintiff's hands, by ³⁹⁸ force of the relation in which he held the Mower notes, it was to be used, so far as was necessary to effect that purpose, to extinguish the balance due the plaintiff from the defendant on the notes in suit. The receipt of this sum by the plaintiff effected and operated upon the suit the same as it would if the plaintiff had received the same sum in the payment of the balance due him on the notes in suit." In the case of *Hunt v. Nevers*, 15 Pick. 500, 26 Am. Dec. 616, Shaw, C. J. says: "It is a general rule that where collateral security is received for a debt, with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary, and the law makes the application; if the proceeds equal or exceed the amount of the debt, it is de facto paid; no action would lie for it; and proof of these facts would support the defense of payment." To the same effect is the case of *Prouty v. Eaton*, 41 Barb. 409, in which the court say: "This, as a matter of law, is a payment upon the principal debt. Prima facie there is nothing else upon which the money paid could apply." The last-named case was one in which the money received was a payment upon a mortgage held as collateral security. Similar cases can be found in other states besides Massachusetts and New York, but no useful purpose

could be served in collecting cases upon this point, as the rule for the application of payments received in such cases is well settled, and rests upon principle as well as upon authority.

Applying this rule to the case at bar, it follows that the orator had no right to apply the money as he did, but that he should have held it until a part of the mortgage debt fell due, and then should have applied it to the part which had fallen ³⁹⁴ due, and as it fell due, and upon his failure to make that application, the law will make it.

The master has found if such application is made, there was nothing due on the mortgage debt at the time the petition was brought, and that the petition should be dismissed.

Some question was made on the trial of this cause before the master respecting the defendant's failure to insure the buildings on the mortgaged premises in accordance with the condition of the mortgage, and the master has found that the mortgagor failed in some respects to insure strictly in accordance with that condition; but he also finds that such failure was the result of a misunderstanding on the part of the mortgagor, and his inability to perform the condition in that respect any sooner than he did, after he learned that the insurance had expired and the buildings were not insured as the condition of the mortgage required. He also finds that no damage was occasioned the orator in consequence of this failure, and that after the insurance was effected, the orator has had the possession of that policy and still has it.

In view of the fact that the orator has made in his brief no point of this failure to keep the buildings on the mortgaged premises insured strictly in accordance with the condition of the mortgage, and no damages having resulted from it, we consider it unnecessary to say anything respecting that matter, but pass by it as the orator has done.

Decree reversed, with costs in this court, and cause remanded with mandate that the bill be dismissed.

Mr. Justice Miles Dissented, and after stating the question before the court said in part:

“In answering this last question upon principle, the rule that the mortgagee cannot apply the insurance money to the payment of the mortgage debt without the consent of the mortgagor, and that the insurance is not effected for the purpose of paying the debt, firmly established by repeated decisions of eminent courts, sheds much light upon the solution of that question. The reason why the mortgagee cannot apply it without the consent of the mortgagor is because it is

not a payment, and never was intended to be such by the parties to the mortgage, and the mortgagee's right to it rests upon the mortgage agreement. The money takes the place of the mortgaged property destroyed: *Powers v. New England F. Ins. Co.*, 69 Vt. 494, 38 Atl. 148; *Gordon v. Ware Sav. Bank*, 115 Mass. 588; *Naquin v. Texas Sav. etc. Assn.*, 95 Tex. 313, 93 Am. St. Rep. 855, 67 S. W. 85, 58 L. R. A. 711; *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150. Like the mortgaged property which it represents, it may be converted by the mortgagee, if he sees fit so to do, upon breach of the condition of the mortgage; but he cannot be compelled to convert it, and if he does not do so, its character remains as mortgage security, and from that it cannot be changed to the injury of the mortgagee by the mortgagor's neglect to perform the condition of his mortgage contract; for it would be inequitable to permit him to profit by his own wrong.

“In considering the rights of mortgagor and mortgagee to the insurance money received on a policy effected by the mortgagor for the benefit of the mortgagee under a condition in the mortgage that he should do so, where such money is received before any part of the debt is due, a distinction is to be carefully observed between their rights to money so received and money received upon a policy assigned to the mortgagee by the mortgagor, covering other property than the mortgaged property and assigned to him as independent security. In the former case the insurance policy adds nothing to the security, and it becomes valuable only when the mortgaged property which it covers ceases to exist in whole or in part; while in the latter case the policy represents a value independent of any other security, and in law it is a pledge. In the former case the money is held under a contract of mortgage, as we have seen. In the latter case the money is held under the contract of pledge. Our own court has settled the character of money received under a policy issued upon the mortgaged property on the application of the mortgagor, for the benefit of the mortgagee, in *Union S. Bank v. Bedell*, 74 Vt. 108, 52 Atl. 270, in which Judge Start, delivering the opinion for the court, says: ‘The mortgagee did not hold the property as a pledge or as collateral security’; and then further along he says: ‘The petitioner's custody of the policy did not add anything to its security.’ Again in *Powers v. New England F. Ins. Co.*, 69 Vt. 494, 38 Atl. 148, Taft, C. J., says: ‘The effect of the provision is to give a mortgagee a lien upon the insurance money in case of loss, securing him by substituting the proceeds of the policy in place of the property.’ The principle upon which money received by a mortgagee on a policy of insurance effected by the mortgagor for the benefit of the mortgagee is similar to the principle upon which the mortgagee receives money assessed as land damages for laying a highway across the mortgaged premises. Taft, C. J., delivering the opinion in *Brooks v. Hubbard*, 73 Vt. 122, 50 Atl. 802, says: ‘The mortgagee would hold

the damages as security for the mortgage debt in the same manner that it held the land.'

"Holding money received on an insurance policy in place of the mortgaged property destroyed is the exercise of a right by the mortgagee derived from the terms of the mortgage, and his right to that money in no way differs from the right which he had in the property which that money represents, except that, being changed to personal property, possession, in some cases, is necessary in order to protect his right as against third parties; but when a breach of the condition of the mortgage happens, in law, he becomes the absolute owner of the undestroyed part of the mortgaged property and also of the money which represents the part destroyed. He becomes such owner not because the money and property are received as a payment, but because by the terms of the mortgage contract he is to become such on failure of the mortgagor to pay the mortgage debt when due. The parties, no doubt, can agree that the money so received may be applied as a payment, as is usually done, either by express or implied agreement, and when it is so applied, it operates like any payment, to extinguish the debt to the extent of the money received. Usually the application of the insurance money can be made when received with benefit to both parties, as where the remaining security is ample and where the mortgagor does not desire to use the money to restore the property destroyed; but where the remaining security is not ample or where the mortgagor desires to use the money to rebuild, great injustice may be done either to the mortgagor or mortgagee by applying the insurance money to the mortgage debt as fast as it falls due. In such a case where the debt equals the value of the mortgaged property, and, to accommodate the mortgagor, the debt is strung out in small annual payments, the first falling due several years after the debt is created, as in the case at bar, and where the insurance money represents a considerable part of the security, such application is grossly inequitable to the mortgagee, as much so as if the mortgagor, whose property had been mortgaged for its full value, had cut the standing timber on the mortgaged premises and sold the same to pay the accruing interest. In either case the mortgagor would retain the possession and use of the mortgaged property, without paying anything from his own funds, by converting a part of the mortgaged property to his own use; and when the money so received and procured had been exhausted, the mortgagee would have his principal debt outstanding, secured only by a remnant of the original mortgaged property. To carry the illustration to a point where the principal part of the security can be wiped out by the application of the insurance money to the payment of the interest, we have only to suppose a case where the security consists almost wholly of the insured property, and the mortgage debt consists of a series of notes made payable a long time in the future, none of them falling due for years. The accruing interest may consume the money received

before any part of the notes falls due. This may be a strong presumption, and the case supposed one that is rarely, if ever, liable to occur, but the principle is the same as in a less extreme case. The only difference lies in the extent of the wrong done. The extreme case, however, serves to bring out more clearly the inequitable result which in some cases would follow the doctrine that the insurance money must be applied by the mortgagee as fast as the debt falls due. It was argued that to thus apply insurance money does not impair the security; but the contention cannot be sustained; for the right to enforce a debt enters into all securities and forms a part of them, and this is observable in the case at bar.

“If the orator in the case at bar must apply the insurance money to the interest which is now due, then there is no breach of the mortgage and his foreclosure must fail, and the mortgagor may continue in the possession of the premises until that money is exhausted; hence he cannot enforce his debt against the security until that event happens; whereas, if the money remained security in place of the property burned, then there would be a breach of the condition of the mortgage and the orator would have the right to the possession of the remaining original security as well as the possession of the money.

“On the part of the mortgagor, cases might arise in which the rule that the mortgagee must hold the money until some part of the debt falls due, and then apply it as fast as it thereafter becomes due would be followed by results as serious to the mortgagor as in other cases it was to the mortgagee. His entire property might be embraced in the property burned, and the use of the insurance money might be necessary to restore it, and his ability to continue in business might depend upon its restoration. The doctrine, then, that the mortgagee must hold the insurance money until some part of the debt falls due and then apply it as fast as it does fall due will operate, in some cases, unjustly to the mortgagee, and in others unjustly to the mortgagor.

“Equity requires that justice should be done in all cases if possible. Adopting the rule laid down in *Powers v. New England F. Ins. Co.*, 69 Vt. 494, 38 Neb. 148, *Union Sav. Bank v. Bedell*, 74 Vt. 108, 52 Atl. 270, *Gordon v. Ware Sav. Bank*, 115 Mass. 588, *Naquin v. Texas Sav. etc. Assn.*, 95 Tex. 313, 93 Am. St. Rep. 855, 67 S. W. 85, 58 L. R. A. 711; *Fergus v. Wilmarth*, 117 Ill. 547, 7 N. E. 508, and *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150, which is that the insurance money received by the mortgagee takes the place of the mortgaged property, equal justice would be done to both parties in all circumstances. The mortgagee would receive it, if the debt was due and unpaid, as he would receive the mortgaged property which it represented, to reasonably account for its use, and if no part of the debt was due he would hold it in the same manner, unless he or the mortgagor saw fit to use it for the restoration of the

property burned. Such an application is sanctioned in *Fergus v. Wilmarth*, 117 Ill. 542, 7 N. E. 508. In that case the insurance money was received before any part of the debt fell due and was placed in bank to await a proper application. The creditor demanded the payment of the money upon his debt which was not due. The mortgagor insisted upon building another house upon the ground. The bank refused to turn it over to the mortgagor, but agreed to pay it to him whenever he should complete the building, so that sufficient insurance could be had upon it to indemnify the mortgagee as fully as he was indemnified before the fire. It was held by the supreme court of Illinois that the money was properly set apart for a legitimate purpose, by which the rights of both parties were equally protected.

“In *Gordon v. Ware Sav. Bank*, 115 Mass. 588, a case cited and approved of in *Fergus v. Wilmarth*, 117 Ill. 542, 7 N. E. 508, the court held that the mortgagee could appropriate the money to the restoration of the property destroyed, and in connection therewith used the following language: ‘The insurance was for indemnity to the mortgagor as well as to the mortgagee. To the mortgagee it was protection of the security, not for payment of the debt. It was collateral to the debt. Money received from insurance took the place of the property destroyed, and was still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt and upon default of payment to convert the securities.’

“In *Naquin v. Texas Sav. etc. Assn.*, 95 Tex. 313, 93 Am. St. Rep. 855, 67 S. W. 85, 58 L. R. A. 711, in which *Gordon v. Ware Sav. Bank*, 115 Mass. 588, is cited approvingly, the court held that the conditional vendor could apply insurance money, received upon a policy effected by the conditional vendee for his benefit, to the restoration of the property destroyed, and in connection therewith the court says: ‘The debt not being due, the money collected upon the insurance policy could not be applied to its liquidation, except by the consent of the creditor and the debtor. The debtor had no more right to demand the application of the money to the satisfaction of those installments which had not fallen due, without the consent of the payee of the obligation, than the payee had to apply it to the satisfaction of the unmatured indebtedness against the wishes of the mortgagor. The rights of the parties were reciprocal under the contract. In this situation the purpose of the parties, in creating the insurance out of which this fund arose was attained by a restoration of the house, thereby placing them in the same situation they were in before the fire.’

“The three cases last above cited show that the ground of the court in holding that the mortgagor or mortgagee has the reciprocal right to apply insurance money, received on a policy effected by the mortgagor for the benefit of the mortgagee, rests upon the doctrine that such insurance money takes the place of the property destroyed.

“If we admit that insurance money, received by the mortgagee, before any breach of the mortgage, under a policy effected by the mortgagor, for the benefit of the mortgagee, represents the mortgaged property, the conclusion that the mortgagor or mortgagee may use it to restore the original value of the mortgaged property is irresistible; for if no part of the debt is due, the mortgagor has a right to the use and possession of the mortgaged property, if the mortgage contains no provision to the contrary, so long as he uses it in a manner which in no way endangers or impairs the mortgage security, and the mortgagee, under similar conditions, has the same right to restore the buildings, because, as is said in *Naquin v. Texas Sav. etc. Assn.*, 95 Tex. 313, 93 Am. St. Rep. 855, 67 S. W. 85, 58 L. R. A. 711: ‘The purpose of the parties in creating the insurance, out of which this fund arose, was attained by a restoration of the house.’

“As it seems to me, not only in principle but upon authority, insurance money received in the manner just described represents the property destroyed. This court in express language has so held, in *Powers v. New England F. Ins. Co.*, 69 Vt. 494, 38 Atl. 148, wherein Taft, C. J., says: ‘The effect of the provision is to give a mortgagee a lien upon the insurance money in case of loss, securing him by substituting the proceeds of the policy in place of the property.’ ”

APPLICATION OF PROCEEDS OF MORTGAGE INSURANCE

- I. Insurance Taken by Mortgagor Alone, 968.
- II. Insurance Taken by Mortgagee Alone, 969.
- III. Insurance at Expense of Mortgagor, 970.
- IV. Insurance for Benefit of Mortgagee, 971.
- V. Application by Agreement, 973.
- VI. Assignment of Policy as Collateral, 973.
- VII. Forfeiture by Mortgagor, 974.

I. Insurance Taken by Mortgagor Alone.

Where the mortgagor insures his own interest, pays the premium, and there is nothing in the mortgage requiring him to insure for the benefit of the mortgagee, and the policy is not assigned to the latter, nor the loss made payable to him, and where the mortgagor does not act as the agent of the mortgagee or for his interest in effecting the insurance, the mortgagee has no claim on the proceeds of the policy, nor any right to apply them on the mortgage debt: *Ridley v. Ennis*, 70 Ala. 463; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Commercial Union Ins. Co. v. Scammon*, 126 Ill. 355, 9 Am. St. Rep. 607, 18 N. E. 562; *Lindley v. Orr*, 83 Ill. App. 70; *Nordyke & M. Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683; *Carter v. Rockett*, 8 Paige Ch. 437.

A mortgagee of property whose mortgage has not been forfeited but has some months to run, has not such a legal title or ownership in such property as will entitle him to collect insurance money pay-

able to its owner, upon its loss, and apply it to the payment of his mortgage: *McDonald v. Black's Admr.*, 20 Ohio, 185, 55 Am. Dec. 448. The mortgagee, merely as such, has no interest either in law or equity, in a policy of insurance effected by the mortgagor upon the mortgaged premises for his own benefit, in the absence of any covenant or agreement requiring the latter to insure for the benefit of the former: *Nordyke & M. Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683; *Ryan v. Adamson*, 57 Iowa, 30, 10 N. W. 287; *Nichols v. Baxter*, 5 R. I. 491. Where a mortgagee has no interest in a policy of insurance taken out by a mortgagor in his own name and for his sole benefit, he cannot, upon foreclosure, and his security proving inadequate by reason of the destruction of the house, be subrogated to the rights of the mortgagor against the insurance company for money due on the policy: *Ryan v. Adamson*, 57 Iowa, 30, 10 N. W. 287.

II. Insurance Taken by Mortgagee Alone.

If a mortgagee procures insurance on his separate interest at his own expense and for his own benefit, without any agreement with the mortgagor with respect thereto, the mortgagor has no interest in the policy, and is not entitled to have the insurance proceeds applied in reduction of the mortgage debt. In other words, if the mortgagee obtains insurance on his own account without any arrangement with the mortgagor, and the premium is not paid by nor charged to such mortgagor, he cannot claim the benefit of the payment of the insurance money: *Honore v. Lamar Ins. Co.*, 51 Ill. 409; *Deming Investment Co. v. Dickerman*, 63 Kan. 728, 88 Am. St. Rep. 265, 66 Pac. 1029, 54 L. R. A. 410; *Cushing v. Thompson*, 34 Me. 496; *Concord M. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Stinchfield v. Milliken*, 71 Me. 567; *White v. Brown*, 2 Cush. 412; *Pendleton v. Elliott*, 67 Mich. 496, 35 N. W. 97; *McDowell v. Morath*, 64 Mo. App. 290; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *Dumbrack v. Neall*, 55 W. Va. 565, 47 S. E. 302.

If one has a subsisting right to redeem or repurchase land conveyed by him as security for a debt, he cannot require the grantee or his assignee to account to him for insurance money received for the loss of the buildings upon it, if the insurance was procured by the grantee or his assignee, with his own money and for his own benefit, and there is no contract between the parties requiring him to account for the money: *McIntire v. Plaisted*, 68 Me. 363. If a mortgagee insures property, the mortgagor, having no connection with it, cannot claim its benefit, and the mortgagee can receive and enjoy the insurance money and still collect the mortgage debt of the mortgagor: *Ely v. Ely*, 80 Ill. 532. A mortgagee insuring premises generally for his own benefit may recover, in case of loss before payment of the mortgage, the entire sum of the insurance, without assigning

his mortgage interest, or any part of it, to the insurers: *King v. State etc. Fire Ins. Co.*, 7 Cush. 1, 54 Am. Dec. 683.

III. Insurance at Expense of Mortgagor.

If insurance on the mortgaged premises has been effected at the request or by the authority of the mortgagor and at his expense, or under circumstances that would make him chargeable with the premium, he is entitled to the benefit of the proceeds thereof, and to have them applied in extinguishment of his debt: *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Callahan v. Linthicum*, 43 Md. 97, 20 Am. Rep. 106; *Soule v. Union Bank*, 45 Barb. 111. If the insurance is effected by the mortgagee under an arrangement with the mortgagor and at his expense, the insurance money paid to the mortgagee will extinguish, pro tanto, the mortgage debt, and the mortgagor may maintain an action on the policy in the name of the mortgagee: *McDowell v. Morath*, 64 Mo. App. 290. And if the policy contains no stipulation for subrogation in case of payment to the mortgagee, and there is any arrangement between the mortgagor and mortgagee, either verbal or written, by which the mortgagor becomes liable to pay for the insurance, he is entitled to have it applied in liquidation of the mortgage debt, pro tanto, which right does not depend upon the fact that he has paid for the insurance, nor upon whether the mortgagee procured it intending to look to the mortgagor for reimbursement of the premium, but upon whether he is liable to the mortgagee therefor under any agreement, express or implied; and in such case, if the insurer receives the premium knowing that it is paid by the mortgagor or for him, he will not, in the absence of a stipulation in the policy, be entitled to be substituted to the rights of the mortgagee against the mortgagor: *Pendleton v. Elliott*, 67 Mich. 496, 35 N. W. 97. Where the mortgagee effects insurance at the request and cost and for the benefit of the mortgagor, as well as his own, the mortgagor has the right, in case of loss, to have the money appropriated to the discharge of his indebtedness: *Concord M. Fire Ins. Co. v. Woodbury*, 45 Me. 447. If a building is insured by the mortgagee in his own name, but for his own security and that of the mortgagor, the latter paying the premium, he is entitled to have the avails, in case of loss, applied to the payment of his debt, and the insurer has no right of subrogation in respect to the mortgage: *Kernochan v. New York etc. Fire Ins. Co.*, 17 N. Y. 428. In computing the amount due under an equitable mortgage, where the mortgagee collects the insurance on the property insured in his own name, he must account for the proceeds if he insures the property upon the authority and at the expense of the mortgagor: *Stinchfield v. Milliken*, 71 Me. 567; and if several notes, payable at different times, are secured by such mortgage and have become overdue, such insurance money is to be appropriated, first, to the payment of interest on all of the notes, and the surplus is to be applied, so far as it

will go, to the payment of the principal of the notes, in the order of their respective pay-days: *Larrabee v. Lumbert*, 32 Me. 97.

In an action to foreclose a mortgage, if the court finds that the plaintiff issued an insurance policy to the defendant mortgagor, and made the loss payable to the mortgagee, who assigned the notes, mortgage, and such policy to another, with the knowledge of the insurer, and that the property insured was totally destroyed by fire, of which the company had notice, and, after inspecting the loss, paid it to such assignee, and took an assignment of the notes, mortgage and policy to itself, such findings are sufficient to show an indebtedness on the part of the insurer to the mortgagor to an amount equal to the proceeds of the policy, which must be considered as a satisfaction pro tanto of the amount due on the notes and mortgage: *Home Ins. Co. v. Marshall*, 48 Kan. 235, 29 Pac. 161.

In cases of the character under discussion, the insurance money cannot be appropriated to the payment of other debts of the mortgagor, unless by his express authority and assent: *Sherman v. Foster*, 158 N. Y. 587, 53 N. E. 504; *Buckley v. Garrett*, 47 Pa. 280.

Several cases maintain that money paid by an insurance company to the mortgagee for a loss on the mortgaged premises, pursuant to an agreement with the mortgagor, cannot be applied by the mortgagee to the payment of the debt secured, if it is not due, without the consent of the mortgagor. Such insurance proceeds in such case are properly applied in repairing the premises or in rebuilding, so as to make them as valuable, or as nearly valuable, as possible, as before the fire and loss: *Gordon v. Ware Sav. Bank*, 115 Mass. 588; *Naquin v. Texas Sav. etc. Assn.*, 95 Tex. 313, 93 Am. St. Rep. 855, 67 S. W. 85, 58 L. R. A. 711.

If a trustee, in pursuance of a provision in a deed of trust, receives insurance money for a loss by fire on buildings on the mortgaged premises, before the mortgage debt has become payable, such insurance having been taken at the expense of the mortgagor, the money so received takes the place of the buildings destroyed, and is in the trustee's hands as a part of the security for the debt, and if he retains it, the mortgagor, being unwilling to have it applied in reduction of the mortgage debt, and at his request the trustee deposits it in a bank of good credit and standing at the time, but which afterward fails, the mortgagor is not entitled, upon foreclosure, to have a sum of money equal to the proceeds of such insurance applied as a payment on the mortgage debt: *Fergus v. Wilmarth*, 117 Ill. 542, 7 N. E. 508.

IV. Insurance for Benefit of Mortgagee.

A covenant or a contract, express or implied, by the mortgagor that he will keep the mortgaged premises insured during the existence of the mortgage, for the benefit of the mortgagee, creates an equitable lien in favor of the latter upon the money due for a loss upon the

policy effected by the former in his own name upon the mortgaged property, whether the policy exists upon the property at the time of the mortgage or is afterward taken out by the mortgagor, and such equitable lien exists to the extent of the mortgage debt to be applied thereon: *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396, 9 N. E. 274; *Wilson v. Hakes*, 36 Ill. App. 539; *Nordyke & M. Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683; *Thomas' Admrs. v. Vonkapff's Exrs.*, 6 Gill & J. 372; *Miller v. Aldrich*, 31 Mich. 408; *Ames v. Richardson*, 29 Minn. 330, 13 N. W. 137; *Hyde v. Hartford Fire Ins. Co.*, 70 Neb. 503, 113 Am. St. Rep. 796, 97 N. W. 629; *Aetna Ins. Co. v. Thompson*, 68 N. H. 20, 73 Am. St. Rep. 552, 40 Atl. 396; *Doughty v. Van Horn*, 29 N. J. Eq. 90; *Carter v. Rockett*, 8 Paige Ch. 437; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 4 Am. Rep. 641; *Wattengel v. Schultz*, 11 Misc. Rep. 165, 32 N. Y. Supp. 91; *Nichols v. Baxter*, 5 R. I. 491; *Wheeler v. Factor's etc. Ins. Co.*, 101 U. S. 439, 25 L. ed. 1055; *American Ice Co. v. Eastern Trust etc. Co.*, 188 U. S. 626, 23 Sup. Ct. Rep. 432, 47 L. ed. 623; *Eastern Milling etc. Co. of N. J. v. Eastern Milling etc. Co. of Pa.*, 125 Fed. 143.

Where there is an agreement between the mortgagor and the mortgagee that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and, in fulfillment of this agreement, the mortgagor takes out a policy of insurance in his own name, which is not assigned to the mortgagee, nor made payable to him in any way, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy to the extent of the mortgage debt: *Chipman v. Carroll*, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305; *Wattengel v. Schultz*, 11 Misc. Rep. 165, 32 N. Y. Supp. 91; and is entitled to an equitable lien on the proceeds of a second insurance policy taken by the mortgagor in his own name, and assigned to others for prior debts, and payable to them as their interests might appear, where the mortgage provides that the grantor will not impair the lien, and the second policy causes a scaling of the first: *Wilson v. Hakes*, 36 Ill. App. 539. Where the mortgagor has covenanted to keep the mortgaged premises insured for the benefit of the mortgagee, and either has effected, or thereafter effects, insurance in his own name, though without the mortgagee's knowledge, or without intent to perform the agreement, equity will treat the insurance as effected under the agreement, and give the mortgagee his equitable lien accordingly: *Nordyke & M. Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683.

After notice to the insurance company having the risk of such equitable lien in favor of the mortgagee, it cannot pay the loss to the assured, except at its peril, until the rights of the mortgagee shall have been adjusted: *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396, 9 N. E. 274. And the insurance company with notice of the

mortgagee's equitable claim or lien, is liable to him for the proceeds of the insurance to the extent of his mortgage debt, even if the whole amount has been paid over, after such notice to the mortgagor: *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 4 Am. Rep. 641.

V. Application by Agreement.

It is within the power of the mortgagor and mortgagee of insured property, as between themselves, to agree before the insurance money is paid that it shall not all be applied on the mortgage indebtedness, and the mortgagee has a right to release a part of his security so far as the mortgagor is concerned, and let him have a part of the insurance money: *Sherman v. Foster*, 158 N. Y. 587, 53 N. E. 504.

If the mortgagor covenants to keep the mortgaged premises insured for the benefit of the mortgagee, and it is also agreed that in case of loss the sum insured shall immediately be applied to rebuilding, the insurance is for the benefit of the mortgagee to the extent of his lien, but he is not entitled to the money, and only to have it applied to the rebuilding of the premises in like good order as they were at the time of the contract, and such an application of the money will be coerced in equity, which will consider the mortgagor, if he has received the insurance money, as a trustee for that object: *Thomas' Admrs. v. Vonkapff's Exrs.*, 6 Gill & J. 372.

If the mortgaged property is insured and subsequently destroyed by fire, and the insurance is transferred, according to agreement, to the mortgagee to be collected and applied as fast as collected in payment of the mortgage indebtedness, the insurance thus collected must be allowed as payment upon the mortgage: *Wilcox v. Allen*, 36 Mich. 160.

If the amount of the insurance money exceeds the amount of the mortgage debt, the parties to the mortgage may agree that the surplus shall be paid over to a named creditor of the mortgagor, but the mortgagee, on receiving the money from the insurance company, is not liable to an action by such creditor to recover such surplus, nor to be held as garnishee therefor, as there is want of privity of contract: *Field v. Crawford*, 6 Gray, 116.

VI. Assignment of Policy as Collateral.

If a policy of insurance upon mortgaged property is assigned to the mortgagee as collateral security, any sum of money to which, as such assignee, he may become entitled by the destruction of the insured property before the foreclosure of the mortgage, is applicable to the payment of the debt, and as to the remainder, he is a trustee of the mortgagor: *Smith v. Packard*, 19 N. H. 575.

If a mortgage has been executed by a father and his two daughters upon property owned by them jointly, and a policy of insurance on such property assigned to the mortgagee as collateral security for the mortgage debt, and after the destruction of the premises by fire

the mortgagee places in the hands of the father, upon his application alone, the proceeds of such policy for the purpose of rebuilding the property destroyed, and such money is not applied by the father to that purpose, the daughters are not prejudiced by his neglect, and, upon foreclosure of the mortgage, they must be credited on the mortgage debt with the money paid upon the policy: *Connecticut M. L. Ins. Co. v. Scammon*, 117 U. S. 634, 6 Sup. Ct. Rep. 889, 29 L. ed. 1007.

VII. Forfeiture by Mortgagor.

If, by reason of a sale and conveyance of the insured premises, without the consent of the insurer, a fire insurance policy has become void as to a mortgagor and his successor in interest, but by the terms of the policy it is still in force as to the mortgagee, and in it the company has been expressly authorized, in case of loss, to pay the whole amount of the proceeds to the mortgagee, and take a transfer and assignment of the mortgage and of all securities held for its payment, the mortgagor, or his successor in interest, has no beneficial interest in the policy, and cannot compel an application on the mortgage debt of the amount due upon the loss: *Sterling Fire Ins. Co. v. Beffrey*, 48 Minn. 9, 50 N. W. 922.

In *Ulster Co. Sav. Inst. v. Lake*, 73 N. Y. 161, 29 Am. Rep. 115, it appeared that a mortgage contained a clause requiring the mortgagor to procure insurance for the benefit of the mortgagee, and the mortgagor procured the insurance, "loss payable to the mortgagee." The mortgagee had an independent contract with the insurance company, by the terms of which all policies of such company assigned to or held by the mortgagee as such should be binding, and providing for subrogation in case the policy should be void as to the mortgagor, and by breach of a condition in the policy it became forfeited as to him. A loss having occurred, the insurer paid the loss to the mortgagee, taking an assignment of so much of the mortgage, subject to the payment of the balance due the mortgagee. In a contest as to surplus moneys arising on a sale under foreclosure, it was held that the agreement between the mortgagee and the insurer and the assignment thereunder were valid, and that the insurer was entitled to the surplus, and that the mortgagor, having forfeited his rights under the policy, was not entitled to the benefit of the payment, and was not injured by the assignment.

SCOVILLE v. BROCK.

[79 Vt. 449, 65 Atl. 577.]

EQUITY PLEADING—Amendment and Answer.—If the plaintiff, after demurrer to his whole bill has been sustained, is, by leave of court, allowed to file an amended bill, the defendant is entitled to answer anew, and to have his former answer dropped from the pleadings. (p. 977.)

EQUITY PLEADING—Amendment of Bill and Answer—Admissions in Answer as Evidence.—If a plaintiff, after demurrer to his whole bill has been sustained, has, by leave of court, filed an amended bill, and the defendant has answered anew, any admissions in defendant's original answer are provable like any other documentary admission not embraced in the record. (p. 978.)

JUDGMENTS—Equitable Relief.—If by fraud and misconduct one has gained an unfair advantage in proceedings at law, whereby the court of law will be made an instrument of injustice, equity will interfere to prevent him from reaping the benefit of the advantage thus unfairly gained. (p. 979.)

JUDGMENTS—Equitable Relief from.—The rule that if one has gained an unfair advantage at law by reason of his fraud, equity will interfere to prevent him from taking advantage thereof, applies where a judgment at law obtained by fraud is relied upon as a defense. (p. 979.)

JUDGMENTS—Equitable Relief from.—Inability to vacate a probate decree allowing a guardian's final account will not prevent affirmative relief in equity, as the trustee may be held accountable, notwithstanding the decree for what is improperly retained. (p. 980.)

GUARDIAN AND WARD—Accounting—Suit to Set Aside Final Settlement.—In a suit to set aside a guardian's final account by which worthless securities were awarded to the ward, based on the fraud of the guardian, a finding that the guardian did not seek to deceive his ward, but gave him all the information he had regarding the securities, does not defeat the suit. The question in such case is not merely whether there was actual fraud or intentional wrong, but whether there was a failure to comply with the rules of law established for the protection of wards, the ward being entitled to be informed, not only of the facts, but also of his rights with reference thereto. (p. 980.)

GUARDIAN AND WARD—Dealings Between.—A guardian cannot deal with his ward in his own interest without first placing the ward upon an equal footing with himself. (p. 981.)

GUARDIAN AND WARD.—Influence of a guardian over his ward is presumed to continue for a time after the guardianship has ceased. (p. 981.)

GUARDIAN AND WARD—Final Settlement—Duty of Guardian.—It is the duty of a guardian, before making final settlement with his ward, to inform him not only of all the facts in connection with the guardianship matters, but also of his legal rights with reference thereto, and the guardian cannot relieve himself of such duty by assuming that the probate judge will give the requisite instructions. (pp. 981, 982.)

GUARDIAN AND WARD—Limitations.—The statute of limitations does not begin to run against a ward so as to prevent him

from setting aside a decree allowing the guardian's final account, based on the guardian's fraud, until the influence of the confidential relation has ceased. (p. 982.)

GUARDIAN AND WARD—Limitations—Fraud of Guardian.—The statute of limitations does not begin to run against a ward to prevent an action by him to set aside a decree settling his guardian's final account, obtained by fraud, until something occurs to raise a doubt of the honesty of the guardian; and if the ward does not know the law as to his rights until nearly eight years after he becomes of age, does not suspect any wrongdoing on the part of his guardian, and continues to have perfect confidence in his integrity, and a belief that he has acted honestly, properly, and legally as his guardian, the defense of the statute of limitations cannot avail the guardian. (p. 982.)

GUARDIAN AND WARD—Setting Aside Final Account.—A statute providing a remedy, after a guardian's discharge, for the correction of his account, relates to a further hearing in the probate court, and does not bar a ward from maintaining an action to set aside a decree allowing the guardian's final account based on fraud. (p. 982.)

GUARDIAN AND WARD—Liability of Guardian—Burden of Proof.—If a guardian is charged with negligence in the management of the funds of his ward, he cannot be held liable if such negligence did not occasion loss to the ward, or if such guardian exercised the requisite care and diligence in respect to investing the funds of the ward in his hands. The burden of proof as to this is upon the guardian. (p. 982.)

GUARDIAN AND WARD—Liability of Guardian.—If a probate court decrees to a ward stocks and bonds in a nonresident corporation, his guardian is not chargeable with negligence in taking such securities instead of demanding cash. (p. 982.)

Suit to set aside a decree allowing a guardian's final account. Such guardian's final account was settled and allowed by the probate court, in the presence of the ward and with his approval, on July 30, 1894, four days after he became of age. On September 19, 1890, and after the appointment of such guardian the probate court decreed to him, as guardian of such ward, certain stocks and bonds in nonresident corporations. The guardian received these securities as guardian and held them until he turned them over to the ward at such final settlement. In the meantime certain of such corporations failed, and some of the securities became worthless, while the guardian was acting in his fiduciary capacity. It is in respect to the management of these securities that the ward complains, and appeals from a decree dismissing his bill.

E. R. Anderson and E. H. Deavitt, for the plaintiff.

M. E. Smilie, for the defendant.

⁴⁵³ MUNSON, J. The master finds from the evidence, and leaves it for the court to say what concessions contained in the answers are available to the orator. The ⁴⁵⁴ original bill was held insufficient on demurrer (75 Vt. 243, 54 Atl. 177), and two several amendments thereto were afterward filed. The defendant then answered the bill and the amendments, "waiving the answer to the original bill." The orator insists that the first answer could not be waived without the express leave of the court, citing *Morrill v. Morrill*, 53 Vt. 74, 38 Am. Rep. 659. That, however, was an amendment interposing a further defense to the same bill, made on leave in the course of the hearing, and done by interlineation; and the decision was merely a condemnation of that method of making an amendment. In this case, a decree of the court of chancery sustaining the demurrer and dismissing the bill was affirmed in the supreme court, and the leave of the court was given when the case came back on remand.

Strictly speaking, where a demurrer to the whole bill is allowed the bill is out of court, and no subsequent proceeding can be taken in the cause. This is the rule as given in 3 Daniell's *Chancery Practice*, first American edition, 668. The author remarked, however, that there were cases where the court had afterward permitted an amendment of the bill to be made, and that even after a bill had been dismissed by order it had been considered allowable for the court to set the case on foot again. But the authority of these cases was questioned, and the author concluded that it might be considered a positive rule, liable to scarcely any exception, that after a demurrer has been allowed the case is entirely out of court. It is said, however, in *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815, that the rigor of this principle has since been relaxed; and Mr. Beach in his *Modern Equity Practice*, section 279, speaks of the rule as one that formerly prevailed. But although the practice discountenanced by Daniell has since obtained, and is now generally ⁴⁵⁵ established by rules of court, logically and technically the situation is the same. The orator must make out a new case, but may do this by amending the rejected bill. This being so, the defendant must be entitled to answer anew, the same as if replying to a bill new in form as well as new in fact.

The decisions point unmistakably to this conclusion. After an amendment, the defendant may demur to the whole bill,

though a demurrer to the original bill has been overruled: *Bancroft v. Wardoua*, 2 Brown C. C. *66. He may demur, though the original bill has been answered: *Cresy v. Beavan*, 13 Sim. *354; *Dillon v. Davis*, 3 Tenn. Ch. 386 (395). He may plead, although a full answer was put in to all that was contained in the original bill: *Ritchie v. Aylwin*, 15 Ves. 79. He must answer all the interrogatories of the amended bill, though some of them are repetitions of those in the original bill and have been answered: *Mazareds v. Maitland*, 3 Madd. 66. It is apparent from those holdings that the amended bill is treated as a new bill, and the defendant's replies to the original bill, whatever they are, as dropped from the pleadings, leaving the defendant to plead anew. Otherwise he could not demur again to the whole bill, for coextensive demurrers are not allowed. Nor could he plead matters covered by his former answer, for the answer would overrule his plea. Nor would he be bound to answer interrogatories in the amended bill that he had already answered.

The right of the defendant to answer anew is broadly asserted by authorities which fully recognize the modern doctrine of amendment after demurrer sustained. It is said in 1 *Beach on Modern Equity Practice*, section 398, citing *Bowen v. Idley*, 6 Paige, 46, and *Bosanquet v. Marsham*, 4 Sim. 573, that where a complainant amends his bill after answer, it is a matter of right ⁴⁵⁶ for the defendant to put in a new or further answer to the amended bill, except where the amendment is one that cannot vary the right of the defendant; that if the substance of the bill is amended in any manner, however trifling, the defendant may put in another answer and make an entirely new defense.

So the answer to the original bill and the concessions contained in it are not now available to the orator. But any material admission which the answer contains is provable, like any other documentary admission not embraced in the record of the proceeding.

The substance of the orator's complaint is that the defendant was negligent in the management of the funds which he held as the orator's guardian, and thereby incurred losses for which he was legally chargeable; and that he induced the orator by fraudulent concealments and representations to approve a final account which relieved him from liability, and that the account was allowed by the probate court because of such approval; and that the decree in that behalf passed with-

out contest and remained unappealed from because of the orator's ignorance of his rights in matters regarding which it was the defendant's duty to give him information. The original bill disclosed the existence of a decree, but contained no allegations regarding the proceedings on which it was based, and this was held insufficient on demurrer because the allegations that the orator's approval of the account was obtained by fraud were not followed by averments sufficient to carry the effect of the alleged fraud into the decree: 75 Vt. 243, 54 Atl. 177. The bill as amended and held sufficient on demurrer alleges, among other additional matters, that the decree was made solely by reason of the approval, and without the ⁴⁵⁷ consideration of any other fact or circumstance: 76 Vt. 385, 57 Atl. 967.

The findings bearing upon the approval are adverse to the orator. The guardian did not suggest the taking of the approval, nor know of it at the time, nor hear of it until informed by these proceedings. The judge of probate took the approval of his own motion, in accordance with his practice in such cases. He considered and passed upon the accountability of the guardian in the matters complained of, independently of the approval. The decree was made upon notice and appearance, after an opportunity to be heard, upon a consideration of matters known to the judge, and as a judicial disposition of the case. The master says he is unable to find that the approval had any influence whatever upon the court in reaching its conclusion. So the claim made by the amended bill in the respect above stated is not sustained.

But it appears from the findings that there was no actual inquiry or hearing, and the orator insists that his failure to contest the account, and his failure to appeal from the decree, were due to the defendant's fraud, and that equity will not permit the defendant to avail himself of the decree for his protection. It is well settled that when one has gained an unfair advantage in proceedings at law by fraud or misconduct, whereby the court of law will be made an instrument of injustice, equity will interfere to prevent him from reaping the benefit of the advantage thus unfairly obtained: *Delaney v. Brown*, 72 Vt. 344, 47 Atl. 1067. The usual application of this rule is in cases where the party in fault is seeking to enforce a judgment, but the reason of it requires its application where the judgment is relied upon in defense. It is not necessary to inquire as to the circumstances in which equity will

⁴⁵⁸ act directly upon a probate decree. Inability to vacate a decree will not prevent affirmative relief, for a trustee may be held accountable, notwithstanding the decree, for what was improperly retained: *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Aldrich v. Burton*, 138 Cal. 220, 94 Am. St. Rep. 43, 71 Pac. 169, and note. It remains to inquire whether the findings entitle the orator to relief of this nature.

It is found that the defendant "in no manner sought to deceive his ward in any particular, but, on the contrary, gave him all the information he possessed in reference to the guardianship matters." It is found more specifically that at the time of the settlement in the probate court the guardian produced the securities and told his ward all that he knew about them; that he told him they were the identical securities turned over to him by the estate, that they had ceased paying interest and dividends at certain dates, that nobody knew what the value of them was, and that some of them might turn out to be good and some might not. Neither party had counsel present and nothing was said to the ward about his having professional or other disinterested advice.

A few days before the settlement the guardian showed a rough draft of his account to the probate judge, and said that considering the way the securities had come into his hands, and the suddenness with which some of them had depreciated in value or become worthless, he ought not to be held responsible. To this the judge made no reply. The judge had some personal knowledge of the character of the securities and considered in view of the knowledge he had that the guardian ought not to be held responsible for the depreciation, and therefore approved the account. Nothing was said at the hearing by anyone about the question of the guardian's liability ⁴⁵⁹ for the losses. It appears from the guardian's earlier remark to the judge that he understood that the situation was such that a question as to his liability might be raised. Was it his duty in the circumstances to say this to his ward, or advise him of his privileges regarding counsel?

The finding the guardian in no way sought to deceive his ward does not dispose of the case. The question is not merely whether there was actual fraud or intentional wrongdoing, but whether there was a failure to comply with the rules which the law has established for the protection of beneficiaries: *Walworth's Estate v. Bartholomew's Estate*, 76 Vt. 1,

56 Atl. 101. Nor is the case disposed of by the finding that the guardian gave his ward all the information he had regarding the securities. The ward was entitled to be informed not only of the facts but of his rights with reference to the facts: *Perry on Trusts*, sec. 851; *Hall v. Turner's Estate*, 78 Vt. 62, 67 Atl. 763; *Burrows v. Walls*, 5 De Gex, M. & G. 233. It is clear that the statement in some of our cases that the guardian must advise his ward of all the facts was not intended to limit this rule; for it is the holding of all the cases that the guardian cannot deal with the ward in his own interest without first placing him upon an equal footing with himself, and this requires something more than a knowledge of the facts. This subject is fully treated in *Wade v. Pulsifer*, 54 Vt. 45.

It is claimed, however, that *Wade v. Pulsifer*, 54 Vt. 45, is not an authority upon the facts presented here. It is said that the transaction in that case was during the ward's minority, while this transaction was after the ward became of age. But this cannot serve to distinguish the cases; for the influence of the fiduciary relation is presumed to continue for a time after the guardianship has ceased: 1 *Story's Equity Jurisprudence*, sec. 217; *Scoville v. Brock*, 76 Vt. 385, 57 Atl. 967; *Gillett v. Willey*, 126 Ill. 310, 9 Am. St. Rep. 587, 19 N. E. 287. It is also said that one transaction was a gift and the other a settlement, but this affords no basis for distinguishing the cases. No satisfactory ground of distinction can be found between the making of a gift and the waiver of a right to enforce a liability. The distinction between gifts and releases made by Chancellor Kent in *Kirby v. Taylor*, 6 Johns. Ch. 242, is discredited by a long line of decisions to the contrary: Note to 89 Am. St. Rep. 303.

But the matter mainly relied upon to distinguish the two cases is the fact that the gifts in the *Pulsifer* case (54 Vt. 45) were made out of court, and that there was nothing in the guardian's account, and nothing said at the hearing, to bring them to the attention of the court. It is urged that the duty of information, as far as it relates to the legal rights of the ward, can have no application to a settlement made in court. This claim, as far as it is based on the nature and effect of the proceeding, is sufficiently covered by the previous discussion. It certainly cannot be sustained on the theory that it is the duty of the probate judge to give the ward whatever legal information his interests may require. If a probate judge has any duty in this respect, it is one that results from the special

circumstances of the particular case, and is nothing that a guardian can rely upon to relieve him from this requirement. The duty in question is one that grows out of the relation between guardian and ward; and it is the guardian's duty to see that his ward has this information before making a final settlement.

But the defendant contends that any right the orator may have had is barred by the expiration of the statutory period of limitation. The statute would not begin to run until the influence ⁴⁶¹ of the confidential relation had ceased: *Scoville v. Brock*, 76 Vt. 385, 57 Atl. 967. The defendant refers to the statement that the orator and the defendant met but once after the settlement, and had no other communication by letter or otherwise, and treats this as a finding that the influence of the confidential relation ceased immediately after the termination of the relation. But the master finds that up to the spring of 1902 the orator had not known the law as to his rights, and had not suspected that the defendant was liable for the losses, and had continued to have perfect confidence in the integrity of the defendant, and a belief that he had acted honestly, properly and legally as his guardian. Although there were no further personal relations to keep up the guardian's direct influence upon the ward, that influence continued to exist in the confidence and beliefs generated by the previous relation and the manner of its termination; and the statute would not come into operation until something occurred to raise a doubt as to the guardian's conduct.

Vermont Statutes, section 2810, also referred to by the defendant, is not a bar to the relief sought. This section relates to a further hearing in the probate court and to the finality of an allowance then made. It was not intended to create an exclusive remedy, and so operate as a limitation upon all remedy if the time fixed was suffered to expire without advantage being taken of the provision.

But the omission of the duty we have pointed out does not make the defendant liable if it did not occasion loss to the orator, and it occasioned no loss to the orator if the defendant exercised the requisite care and diligence in respect to the investments in his hands, for it is only upon the ground that this was wanting that the defendant can be made liable. But ⁴⁶² the question whether the defendant exercised proper care and diligence in the circumstances of the case is a question of fact, and the master has not passed upon it. It is doubtless

true that the burden of proof as to this is on the defendant, so that the question could be decided against him on the report as it stands; but we are not inclined to take this course, for injustice would then be done the defendant if he was not in fact negligent. It is therefore deemed proper to have the report recommitted that the master may pass on this question.

The defendant is not chargeable with negligence in receiving the securities instead of demanding cash. It was so held in *Scoville v. Brock*, 76 Vt. 385, 57 Atl. 967, and the facts upon this point are now the same as were admitted by the demurrer. The inquiry will be whether the defendant in continuing to hold the securities acted with fidelity, and with that measure of care and diligence that a prudent man would have exercised in the same circumstances. And if it is found that the defendant, in the faithful and prudent administration of his trust, ought to have disposed of the securities at any time, the value of the securities is to be determined with reference to that time.

Pro forma decree reversed, and cause remanded that the report may be recommitted for the purpose stated.

Relief in Equity Against Judgments on the ground of fraud and perjury is discussed in the notes to *Pico v. Cohn*, 25 Am. St. Rep. 165; *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 232; *Furman v. Furman*, 60 Am. St. Rep. 649. If trustees under a will, in the absence and without the knowledge of the beneficiary, present a false and fraudulent account to the court and secure its settlement and allowance, this is fraud extrinsic to the case, and the beneficiary, on discovering the fraud after the time limited to move in the matter or to take an appeal from the order, may maintain a suit in equity to compel the trustees to pay her the sum of which she has been defrauded: *Aldrich v. Barton*, 138 Cal. 220, 94 Am. St. Rep. 43. See, also, *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 47.

Relief in Equity from the Orders and Decrees of Probate Courts is the subject of a note to *Froebrich v. Lane*, 106 Am. St. Rep. 639. A decree of a probate court settling the account of a guardian and discharging him may, if procured by fraud, be set aside by a court of equity: *Nelson v. Cowling*, 77 Ark. 351, 113 Am. St. Rep. 155; *Willis v. Rice*, 141 Ala. 168, 109 Am. St. Rep. 26.

LEWIS v. ROBY.

[79 Vt. 487, 65 Atl. 524.]

HUSBAND AND WIFE—Alienation of Affection—Defenses—Mitigation of Damages.—In an action by a husband for the alienation of his wife's affections by seducing and committing adultery with her, evidence of the unhappy relations existing between husband and wife prior to such alienation, want of affection between them, and the husband's negligence or immorality, can only be shown in mitigation of damages, and not in bar of the action, unless plaintiff consented to the acts of the defendant. (pp. 984, 985.)

J. C. Enright, F. C. Davis and E. R. Buck, for the plaintiff.

Davis & Davis and F. H. Spaulding, for the defendant.

489 TYLER, J. This action is brought for the alleged alienation by the defendant of the plaintiff's wife's affections by seducing and having sexual intercourse with her. The exceptions are to the refusal of the court to charge as the defendant requested and to some portions of the charge as given.

The defendant's fifth and seventh requests were as follows, and were not complied with:

"If the jury find from the testimony that the affection or love of Effie E. Lewis was alienated from her husband by his own conduct, absence, neglect or other acts, and not by any act of defendant, the plaintiff cannot recover in this action."

490 "That if the jury find from the testimony that the plaintiff's acts, conduct, abuse or neglect contributed in bringing about any alienation of the affections of his wife (if such affections were in fact alienated), then the plaintiff cannot recover."

The defendant insists that if the affections of the plaintiff's wife were not alienated from him by any act of the defendant the plaintiff cannot recover; that if the wife's affection for her husband had been destroyed by his own conduct, there was nothing to be alienated by the defendant's adultery with her.

The defendant was not entitled to have the jury instructed as requested. The instruction was correct, that the only question was whether or not the defendant had sexual intercourse with Mrs. Lewis, as alleged; that the plaintiff's neglect of his wife would not justify the act, if committed;

that nothing would then be a bar to an action for the tort except the plaintiff's consent thereto. This has long been the rule of the common law—some authorities say “from time immemorial.” Blackstone says (volume 3, page 139) that for criminal conversation with a man's wife, “considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband in an action of trespass”: *Brown v. Spaulding*, 63 N. H. 622, 4 Atl. 394. *Weeden v. Timbrel*, 57 Term Rep. 357, cited by the defendant, supports this doctrine: 21 Cyc. 1626; 8 Am. & Eng. Ency. of Law, tit. “Criminal Conversation.” The point made by the defendant's fifth and seventh requests has been before courts in other jurisdictions. In *Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489, it was held that though the wife has no affection for her husband, another person has no right to interfere to cut off all chance of its springing up in the future. This is the doctrine in *Prettyman v. Williamson*, 1 Penne. (Del.) 224, 39 Atl. 491 731, and it was recognized in *Fratini v. Caslim*, 66 Vt. 273, 44 Am. St. Rep. 843, 29 Atl. 252; *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607.

Evidence of unhappy relations existing between husband and wife prior to the alienation, want of affection between them, the husband's negligence or immorality, can only be shown in mitigation of damages. The rule of law and the reason of it are well stated in the text in 8 American and English Encyclopedia of Law, 461: “Marriage is an institution of society having its foundation in a civil contract which imposes upon the parties certain duties and invests them with corresponding rights. A fundamental right which flows from this relation, and one which the well-being of society requires should be maintained inviolate, is that of exclusive marital intercourse which each acquires with the other. It follows, then, that whoever commits adultery with either of the parties, commits a trespass upon the rights of the other.”

Judgment affirmed.

Alienating Wife's Affections.—The Decision in the Principal Case is supported by *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607. It has recently been decided that in an action for alienating the affections of a husband the defendant may show, in mitigation of damages, that other women than herself maintained improper relations with the husband, although this fact was unknown to the plaintiff: *Angell v. Reynolds*, 26 R. I. 160, 106 Am. St. Rep. 707.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

DAVIDOR v. ROSENBERG.

[130 Wis. 22, 109 N. W. 925.]

NE EXEAT.—While the Statutes of Wisconsin recognize the writ of ne exeat, and regulate the practice, its functions and the grounds upon which it issues must be determined by a reference to the common law. (p. 987.)

NE EXEAT.—At the Common Law Ne Exeat was simply a writ to obtain equitable bail. (p. 987.)

NE EXEAT—When and for and Against Whom to Issue.—At the Common Law the Writ of ne exeat issued by a court of equity on the application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount or capable of being made certain, on an equitable demand not suable at law, save in cases of account and perhaps some other cases of concurrent jurisdiction, and that the defendant was about to depart from the realm under circumstances which would render a decree ineffectual. (p. 987.)

NE EXEAT is Issued only Against a Debtor Who is a Party to the Suit.—It does not issue against one who is not a debtor, whether he is a party to the suit or not. (p. 987.)

NE EXEAT does not Issue Against the Plaintiff in a suit on the application of a defendant who has interposed no counterclaim. (p. 988.)

Harry M. Silber, for the appellant.

C. H. Hamilton and William Kaumheimer, for the respondent.

23 WINSLOW, J. The plaintiff sued the defendant in equity, alleging numerous money transactions between himself and the defendant, and praying for an accounting and judg-

(986)

ment for the balance due. The defendant, before answering, made affidavit alleging that plaintiff was indebted to him for money loaned; that plaintiff had recently transferred all his real and personal property to one Alice M. Dawson without consideration and in fraud of his creditors; and that he had good reason to believe that both said Dawson and the plaintiff intended ²⁴ to leave the state with such personal property and leave the defendant remediless. Upon this affidavit a writ of ne exeat was issued against the plaintiff and said Dawson, and they were arrested and gave bail. Upon motion the writ of ne exeat was vacated, and the defendant appeals from the order of vacation.

The writ of ne exeat is not created, nor are its functions defined, by statute. Sections 2784, 2785, 2786 of the Statutes of 1898 recognize the common-law writ and make certain provisions regulating the practice, but do not pretend to enlarge its scope. As to the general functions of the writ and the grounds upon which it may issue we must turn to the principles of the common law: *Bonesteel v. Bonesteel*, 28 Wis. 245. At common law, it was simply a writ to obtain equitable bail. It was issued by a court of equity on application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount or capable of being made certain, on an equitable demand not suable at law (except in cases of account and possibly some other cases of concurrent jurisdiction), and that the defendant was about to leave the jurisdiction, having conveyed away his property, or under other circumstances which would render any decree ineffectual: *Dean v. Smith*, 23 Wis. 483, 99 Am. Dec. 193; *Rhodes v. Cousins*, 6 Rand. 188, 18 Am. Dec. 715; *Gilbert v. Colt*, 1 Hopk. Ch. 496, 14 Am. Dec. 557, and note.

It is issued only against a debtor who was a party to the suit, not against a third person not a debtor whether he be a party to the suit or not. The ancient writ always recited that it appears that the defendant is indebted to the complainant and designs quickly to go to parts beyond the seas: *Beames on Ne Exeat*, 18. Nor is this latter rule in any wise changed by the terms of section 2784, *supra*, which provides that the writ may be granted to prevent "any person" from leaving the state, for the obvious reason that the following section provides that no writ shall be granted unless it appears that "sufficient ²⁵ grounds" exist therefor. Sufficient grounds means, as we have seen, grounds sufficient under the principles of the

common law, and no grounds are sufficient under those principles unless it appears that the party is a debtor. So it is very certain that the writ was rightly vacated as to Alice M. Dawson, who was neither a debtor nor a party to the action.

It seems equally certain that the writ was not granted at common law on the application of the defendant against the plaintiff. We have been referred to no case where the defendant was awarded the writ against the plaintiff, nor have we found any. On the contrary, both the decisions and the text-books describe the writ as one issued on application of the complainant and against the defendant, and our statutes plainly recognize and emphasize this principle by providing that it shall only be granted on the affidavit of the plaintiff or some indifferent witness, and that the penalty of the bond or security to be given by the defendant shall be indorsed on the writ: Sec. 2785, *supra*.

Whether a defendant who has already interposed a counterclaim, showing a certain debt due him from the plaintiff on an equitable demand, may be regarded as a plaintiff so as to be entitled to the writ upon a proper showing, is a question not before us, and one on which we intimate no opinion. When this writ was granted no such counterclaim had been interposed, and the writ was, therefore, granted without jurisdiction in any view of the case.

By the Court. Order affirmed.

THE WRIT OF NE EXEAT.

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I. General Nature and Scope of Writ.

a. **As a Prerogative Writ in England.**—The writ of ne exeat was originally a high prerogative writ, issued for state or political purpose to forbid a subject to depart from the realm. It was founded on the idea that, since every man was bound to defend the king and his realm, the king might, as part of the prerogative of the crown, command any man not to go beyond the seas or out of the realm. While the writ was at first confined to state affairs, it was afterward extended to private or civil cases and transactions: *People v. Barton*, 16 Colo. 75, 26 Pac. 149; *Forrest v. Forrest*, 10 Barb. 46; *Dick v. Swinton*, 1 Ves. & B. 373; *Jackson v. Petrie*, 10 Ves. 164; *Boehm v. Wood*, Turn. & R. 343; *Whitehouse v. Partridge*, 3 Swanst. 377.

b. **As Ordinary Process in America.**—The writ of ne exeat is not in this age, and certainly not in the United States, looked upon as a prerogative writ. It is a mere ordinary process of a court of equity, issued upon cause shown, to restrain a party from leaving the state or the jurisdiction of the court until he has given bail to perform its decree, and commanding his arrest and detention if he fails to furnish such bail. It is, then, in the nature of equitable bail: *Gresham v. Peterson*, 25 Ark. 377; *Bleyer v. Blum*, 70 Ga. 558; *Mitchell v. Bunch*, 2 Paige, 606, 22 Am. Dec. 669; *Gleason v. Bisby*, Clarke Ch. 551; *Cable v. Alvord*, 27 Ohio St. 654; *Ramsay v. Joyce*, 1 McMull. Eq. 236, 37 Am. Dec. 550; *Adams v. Whitcomb*, 46 Vt. 708. It is sometimes spoken of as a provisional remedy. But it is more than a mere provisional remedy, in the sense that it can be issued only pending the suit, and must expire upon the rendition of judgment. It may be provided for in the final decree; and it will continue in force until dissolved by the court, or the judgment is satisfied, or proper security is given: *Lewis v. Shainwald*, 48 Fed. 492.

In many of the American commonwealths the writ of ne exeat has been abolished by statute, either expressly or by implication: *Ex parte Harker*, 49 Cal. 465; *Collins v. Collins*, 80 N. Y. 24; *Cable v. Alvord*, 27 Ohio St. 654. Some courts appear to have taken the view that an arrest and detention under a writ of ne exeat to prevent a person from leaving the state until he gives security for his appearance constitutes an imprisonment for debt within the meaning of the constitutional inhibition: *Scoggin v. Taylor*, 13 Ark. 380; *Malcom v. Andrews*, 68 Ill. 100. Other courts, however, have taken the contrary and more reasonable view: *People v. Barton*, 16 Colo. 75, 26 Pac. 149; *Brown v. Haff*, 5 Paige, 235; *Bushnell v. Bushnell*, 15 Barb. 399; *Dean v. Smith*, 23 Wis. 483, 99 Am. Dec. 193. Probably in a majority of the states the writ has been supplanted by

statutory remedies for detaining debtors about to leave the state, until they give security. But, in a number of the states the writ is expressly recognized by statute: See the principal case; *Bleyer v. Blum*, 70 Ga. 558; *Ramsey v. Fay*, 10 Ind. 493. It has been incorporated in the federal statutes: See U. S. Rev. Stats. 717; *Shainwald v. Lewis*, 46 Fed. 839.

In those states of the Union where the writ is still employed as a remedial process, it is usually considered as a writ of right in those cases where it is properly grantable: *Lucas v. Hickman*, 2 Stew. 111, 19 Am. Dec. 44; *Samuel v. Wiley*, 50 N. H. 353; *Gibert v. Colt*, 1 Hopk. Ch. 496, 14 Am. Dec. 557, and note. Nevertheless some authorities regard the application for a writ, at least in some measure, as addressed to the discretion of the court: *Pratt v. Wells*, 1 Barb. 425; and, like all other writs issued by the court when exercising equitable jurisdiction, do not grant it without some regard to a comparison of the relative mischiefs which its refusal or allowance will involve: *Harrison v. Graham*, 110 Fed. 896.

II. Prerequisites to Issuance of Writ.

a. **In General.**—The early authorities declare that a writ of *ne exeat* can be issued only when it appears that there is a precise amount of debt positively due; that it is an equitable demand not suable at law, except in cases of account and some others of concurrent jurisdiction; and that the defendant is departing from the state or country to avoid payment: *Rhodes v. Cousins*, 6 Rand. 188, 18 Am. Dec. 715; note to *Gibert v. Colt*, 14 Am. Dec. 560. These rigid requirements have to some extent been modified in later years, as presently will be seen. An additional prerequisite to granting the writ is that there must be no adequate legal process or remedy available to the applicant: *Hannahan v. Nichols*, 17 Ga. 77; *Ross v. Hawkins*, 29 Ga. 261; *Hawthorne v. Kelly*, 30 Ga. 965; *Orme v. McPherson*, 36 Ga. 571; *Victor Scale Co. v. Shurtteff*, 81 Ill. 313; *Brophy v. Sheppard*, 124 Ill. App. 512; *Pratt v. Wells*, 1 Barb. 425; *Nixon v. Richardson*, 4 Desaus. 108.

b. **Existence and Maturity of Debt.**—In order to authorize the issuance of a writ of *ne exeat*, there must, as a rule, be a debt or duty existing at the time, and so far mature at the time that present payment or performance can rightfully be demanded: *Cox's Exrs. v. Scott*, 5 Har. & J. 384; *Seymour v. Hazard*, 1 Johns. Ch. 1; *Glcason v. Bisby*, 1 Clarke Ch. 551; *Williams v. Williams*, 3 N. J. Eq. 130; *Rhodes v. Cousins*, 6 Rand. 188, 18 Am. Dec. 715; *Colverson v. Bloomfield*, 54 L. J. Ch. 817, 29 Ch. D. 341. This rule, however, has been changed in some jurisdictions: *Hunter v. Nelson*, 5 Blackf. (Ind.) 263.

c. **Certainty of Amount of Demand.**—Another general rule is, that in order to move a court to issue the writ of *ne exeat*, the ap-

plicant must show that there is a certain or precise amount of debt positively due: *Rhodes v. Cousins*, 6 Rand. 715, 18 Am. Dec. 715; *Alder v. Ward*, 5 Ir. Eq. 367; *Anonymous*, 5 N. R. 358. Said Justice Shaw: "The general rule of practice to be gathered from the cases, we think, is that the writ is to be granted only in a case of equitable ascertained debt, to which affidavit can be made with a good degree of certainty; or when it can be shown by or reference to accounts or other authorized documents, to the reasonable satisfaction of the court, that something in the nature of an ascertainment of a debt has taken place, whereupon a debt arises. But we think that the writ is not grantable when the account is open and unliquidated, although the plaintiff states in his affidavit that a certain sum is due": *Rice v. Hale*, 59 Mass. (5 Cush.) 238. "This general statement of the rule omits, of course, its qualifications, and it cannot be given in its entirety with so much positiveness": *Harrison v. Graham*, 110 Fed. 896. In some jurisdiction a more satisfactory doctrine has been established, and the writ made issuable in a proper case whether a sum certain is due or not: *Lucas v. Hickman*, 2 Stew. 111, 19 Am. Dec. 44.

d. Departure of Defendant from Realm.—The writ of ne exeat will usually issue only against one who is about to leave the state or country, or to remove his property therefrom, in order to avoid his obligations or defeat the claims of creditors: *Reed v. Barber*, 110 Ga. 524, 35 S. E. 650; *Rhodes v. Cousins*, 6 Rand. 188, 18 Am. Dec. 715. It is not necessary, however, that the defendant should be actually in the state when application is made for the writ: *Parker v. Parker*, 12 N. J. Eq. 105. The design to depart or remove must be to do so quickly: *Lowenstein v. Biernbaum*, Fed. Cas. No. 8461a; *Shainwald v. Lewis*, 46 Fed. 839. And there must be more than a mere fear or apprehension of the departure to warrant the issuance of the writ: *Forrest v. Forrest*, 10 Barb. 46; *Woodward v. Schatzell*, 3 Johns. Ch. 412; *Lehman v. Logan*, 42 N. C. (7 Ired. Eq.) 296. Moreover, the mere fact that one is about to remove from the state with all his property does not necessarily raise such a presumption as will justify the issuance: *Brophy v. Sheppard*, 124 Ill. App. 512. When the maker of a note is about to remove from the state with all his property, the fact that his surety is solvent and accessible is not ground for denying the writ: *Fitzgerald v. Gray*, 59 Ind. 254. The writ should not be issued merely on the apprehension of the plaintiff that the defendant, who is about to leave the state, does not intend to return in season to perform his contract: *De Ravodinoli v. Corsetti*, 4 Paige, 264, 25 Am. Dec. 532.

III. Demands and Actions Which will Sustain Writ.

a. Equitable and Legal Demands.—It is a general rule that the writ of ne exeat does not issue except in cases of equitable demands, and is not allowed on merely legal claims, except in cases of ac-

count and probably some other cases of concurrent jurisdiction: See the principal case; *Cox's Exrs. v. Scott*, 5 Har. & J. 384; *Seymour v. Hazard*, 1 Johns. Ch. 1; *Smedberg v. Mark*, 6 Johns. Ch. 138; *Allen v. Hyde*, 2 Abb. N. C. 197; *Ellingwood v. Stevenson*, 4 Sandf. Ch. 366; *Edwards v. Massey*, 8 N. C. (1 Hawks.) 359; *Cable v. Alvord*, 27 Ohio St. 654; *Rhodes v. Cousins*, 6 Rand. 188, 18 Am. Dec. 715; *Graham v. Stucken*, 4 Blatchf. 50, Fed. Cas. No. 5677; *Brocker v. Hamilton*, Dick. 154; *Whitchhouse v. Partridge*, 3 Swanst. 377; *Cock v. Ravie*, 6 Ves. 283; *Drover v. Beyer*, 49 L. J. Ch. 37, 13 Ch. D. 242. It "is granted only where it appears that the complainant has an equitable demand or some ground for sustaining his bill in this court, and not where his debt or demand is entirely at law": *Palmer v. Van Doren*, 2 Edw. Ch. 424.

This rule has been changed by statute in some states: *Hunter v. Nelson*, 5 Blackf. (Ind.) 263. And it has been argued, although unavailingly, that inasmuch as the codes in many states have abolished the distinction between actions at law and suits in equity, the writ of *ne exeat* may issue properly in any civil action, without regard to the question as to whether it would have been, before the enactment of the codes, a legal or an equitable action, providing the party applying for the writ shows the existence of the grounds therefor required by statute: *Bonesteel v. Bonesteel*, 28 Wis. 245.

b. *Suits for Accounting.*—An action for an account is in the nature of an equitable demand for which the writ of *ne exeat* will issue: *MacDonough v. Gaynor*, 18 N. J. Eq. 249; *Hannay v. McEntire*, 11 Ves. 55; *Jones v. Alephsin*, 16 Ves. 470. It is properly issued in an action to compel a partnership accounting, where the complaint and affidavits show that the defendant has sold all his property in the state, and converted it into money or choses in action, and is threatening to leave the state: *Dean v. Smith*, 23 Wis. 483, 99 Am. Dec. 193.

A writ of *ne exeat* will issue to protect a minor ward and hold his guardian to an accounting. Thus, where it is made to appear that a guardian has become insolvent, that he has squandered and misappropriated the trust estate, that he has failed to comply with the statute requiring him to report, and that he is about to depart from the state in order to defraud his ward, a proper case is presented for the issuance of the writ: *People v. Barton*, 16 Colo. 75, 26 Pac. 149.

A writ of *ne exeat* will issue to restrain an executor or administrator from leaving the state. It may be granted either on the application of his sureties or the heirs of the estate: *Ruddell v. Childress*, 31 Ark. 511; *Sheppard v. Blue*, 26 Ga. 117; *Patterson v. McLaughlin*, 1 Cranch, 352, Fed. Cas. No. 10,828. A court of chancery has jurisdiction to compel a foreign executor or administrator to account for the trust funds which he has received abroad and brought into this state; and upon a bill filed against him, if he is

about to depart from the state, he may be arrested on a ne exeat and held to equitable bail as in other cases: *McNamara v. Dwyer*, 7 Paige, 239. But the writ will not issue against an executor or administrator when there is no affidavit that any assets have come into his hands: *Smedberg v. Mark*, 6 Johns. Ch. 138.

c. **Miscellaneous Actions and Demands.**—No exeat has been issued at the suit of a master of a vessel against the owners in an action to recover wages and disbursements on behalf of the ship, when the owners have taken it in replevin: *Bryson v. Petty*, 1 Bland, 182. It has also been issued in aid of an injunction restraining an actor from playing at a theater in violation of his contract: *Hayes v. Willis*, 11 Abb. Pr., N. S., 167. A person holding a covenant of warranty may, pending a suit against him for the premises, have a ne exeat against his warrantor: *Hampton v. Pool*, 28 Ga. 514. In a suit for specific performance the writ will not be granted unless the court can clearly see that a decree will be made for the complainant, which the defendant should obey: *Gleason v. Bisby*, 1 Clarke Ch. 551; *Brown v. Haff*, 5 Paige, 235, 28 Am. Dec. 425. It has been refused upon a bill to enforce a contract for the sale of a share in a patent against the vendor: *Cowdin v. Cram*, 3 Edw. Ch. 23.

d. **Actions for Divorce and Alimony.**—A modification of the rule that the writ of ne exeat will issue only on equitable demands is found in cases of alimony. The practice has, from early times, prevailed in many jurisdictions, of granting the writ on the application of the wife, supported by her affidavit and usually by the affidavits of other persons that the husband is about to leave the state or country to avoid the payment of alimony: *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407; *Harper v. Rooker*, 52 Ill. 370; *Bayly v. Bayly*, 2 Md. Ch. 326; *Yule v. Yule*, 10 N. J. Eq. 138; *Elliott v. Elliott* (N. J. Eq.), 36 Atl. 951; *Prather v. Prather*, 4 Desaus. 33. It seems to have been the English practice, and also the practice in some of the American courts, not to issue the writ until a decree for alimony has been made: *Bailey v. Cadwell*, 51 Mich. 217, 16 N. W. 381; *Coglar v. Coglar*, 1 Ves. Jr. 94; *Shaftoe v. Shaftoe*, 7 Ves. Jr. 172. The better rule, however, and the one approved in recent practice, is to issue the writ, upon a proper showing, pending an application for alimony, or maintenance, and prior to a decree therefor: *Marselis v. People*, 18 Colo. App. 258, 71 Pac. 429; *Bronk v. State*, 43 Fla. 461, 99 Am. St. Rep. 119, 31 South. 248; *Lamar v. Lamar*, 123 Ga. 827, 107 Am. St. Rep. 169, 51 S. E. 763. But it seems a court has no jurisdiction to issue the writ in a suit by a wife for support, when neither of the parties are residents of the state when the bill was filed, and the matrimonial domicile was not

in the state at the time of the neglect complained of: *Dithmar v. Dithmar*, 68 N. J. Eq. 533, 59 Atl. 644.

IV. Courts Issuing Ne Exeat.

Writs of ne exeat usually issue out of courts of chancery or tribunals having equitable jurisdiction. A justice of the peace has no authority to issue the writ: *Straughan v. Inge*, 5 Ind. 157. Neither has a circuit court commissioner: *Bailey v. Cadwell*, 51 Mich. 217, 16 N. W. 381. But in some states the statutes invest masters in chancery with authority, in the absence or inability of the judge to act, to order the issuance of the writ: *Bassett v. Bratton*, 86 Ill. 152. And in some states the supreme court has authority to grant the writ, in a proper case, according to the course of practice in chancery: *Rice v. Hale*, 59 Mass. (5 Cush.) 238. The United States courts are authorized to grant the writ: *Lewis v. Shainwald*, 48 Fed. 492. And this has recently been held true of a bankruptcy court: *In re Cohen*, 136 Fed. 999.

V. Parties Plaintiff and Defendant.

As a rule, ne exeat issues only on the application of the complainant against the defendant. It will not issue on the application of the defendant, unless, perhaps, he has already interposed a counterclaim: See the principal case. And it seems that the writ will not issue against a garnishee: *Patterson v. Bowie*, 1 Cranch C. C. 425, Fed. Cas. No. 10,825. Clearly, it will not issue in favor of one having no legal right to sue: *Redd v. Wood*, 2 Ga. Dec. 174. The writ may be issued against a foreigner or citizen of another state on a demand arising abroad: *Woodward v. Schatzell*, 3 Johns. Ch. 412; *Gibert v. Colt*, 1 Hopk. Ch. 496, 14 Am. Dec. 557; *Mitchell v. Bunch*, 2 Paige, 606, 22 Am. Dec. 669. And it may be granted against a nonresident temporarily within the state (*MacDonough v. Gaynor*, 18 N. J. Eq. 249), unless he is exempt from service of process, as when in the state as a witness in a trial at law: *Dixon v. Ely*, 4 Edw. Ch. 557. It is not essential that the defendant should actually be in the state at the time of the application for the writ: *Parker v. Parker*, 12 N. J. Eq. 105.

VI. Proceedings to Obtain Writ.

a. **Manner of Making Application.**—The writ of ne exeat may be applied for in the bill. The usual practice, however, is to make the application by petition or motion supported by affidavits. It is not necessary to pray for the writ in the bill, nor is it necessary to give notice to the adverse party. The application is in its nature ex parte, and it is not proper practice to proceed by an order to show cause. The writ may issue at any stage of the proceedings: *People v. Barton*, 16 Colo. 75, 26 Pac. 149; *Bleyer v. Blum*, 70 Ga. 558; *Bayly v. Bayly*, 2 Md. Ch. 326; *Samuel v. Wiley*, 50 N. H. 353; *Dun-*

ham v. Jackson, 1 Paige, 629; Elliott v. Sinclair, Jac. 545; Collinson v. ———, 18 Ves. 353; Moore v. Hudson, 6 Madd. 218; Barned v. Laing, 13 Sim. 255, 12 L. J. Ch. 377. While some authorities seem to take a contrary view (Bylandt v. Bylandt, 6 N. J. Eq. 28; Mattocks v. Tremain, 3 Johns. Ch. 75), it is probable that the writ may be granted on affidavits made before a suit is pending in court between the parties: Clark v. Clark, 51 N. J. Eq. 404, 26 Atl. 1012; and its issuance may be provided for in the final decree: Lewis v. Shainwald, 48 Fed. 492.

b. **Filing of Affidavits and Contents Thereof.**—The mere fears and apprehensions of the applicant will not warrant the issuance of the writ, but the facts must be set forth on which the court can repose its belief: Anshutz v. Anshutz, 16 N. J. Eq. 162; Forrest v. Forrest, 10 Barb. 46; Lehman v. Logan, 42 N. C. 296. And they must, as a rule, be averred positively: Rhodes v. Cousins, 6 Band. 188, 18 Am. Dec. 715; Orme v. McPherson, 36 Ga. 571. It has been affirmed that an affidavit by an agent, or by the complainants themselves, that the allegations are true to the best of affiant's knowledge and belief, is insufficient: Wallace v. Duncan, 13 Ga. 41; Bryan v. Ponder, 23 Ga. 480; Holliday v. Riodan, 25 Ga. 629; Old Hickory D. Co. v. Bleyer, 74 Ga. 201. Yet where the plaintiff swears that he has reason to believe, and does verily believe, that the defendants are about to remove from the state, this is enough: Simkins v. Lamb, 9 Ind. 543; Smith v. Koontz, 5 Tenn. (4 Hayw.) 189. The affidavit may be aided or supplemented by a reference to the charges in the verified bill: Clayton v. Mitchell, 1 Del. Ch. 32; Orme v. McPherson, 36 Ga. 571. And the bill, petition, or affidavit may, when defective, be cured by amendment: Fisher v. Stone, 4 Ill. 68; Bassett v. Bratton, 86 Ill. 152; Louderback v. Rosengrant, 4 Ind. 563; Fitzgerald v. Gray, 59 Ind. 254; Gernon v. Bocaline, 2 Wash. C. C. 130, Fed. Cas. No. 5367. An agent may verify the application for a writ, when the facts are known to him: Orme v. McPherson, 36 Ga. 571; Simpkins v. Malatt, 9 Ind. 543.

The general rule announced by the authorities is, that the petition or affidavit must contain a positive averment that the demand is due and certain in amount, save that in cases of account the plaintiff may swear that something is due him and then swear to the amount thereof according to the best of his knowledge and belief: Clayton v. Mitchell, 1 Del. Ch. 32; Clowes v. Judge, 1 Del. Ch. 295; Graham v. Noble, 19 La. Ann. 512; MacDonough v. Gaynor, 18 N. J. Eq. 249; Gibert v. Colt, 1 Hopk. Ch. 496, 14 Am. Dec. 557; Thorne v. Halsey, 7 Johns. Ch. 189; Gernon v. Bocaline, 2 Wash. C. C. 130, Fed. Cas. No. 5367; McKenzie v. Cowing, 4 Cranch C. C. 479, Fed. Cas. No. 8856; Rico v. Gaultier, 3 Atk. 501; Hyde v. Whitfield, 19 Ves. 342.

The affidavit of the applicant should also show that the defendant intends to leave the state. It must be positive as to this point, or

to his threats or declarations to that effect, or to facts evincing it, or circumstances amounting to it: *Moore v. Gleaton*, 23 Ga. 142; *Florence v. Camp*, 5 La. 280; *Mason v. Hutchings*, 20 Me. 77; *Yule v. Yule*, 10 N. J. Eq. 138; *Oldham v. Oldham*, 7 Ves. 410. Moreover, the affidavit should show that the debt will be endangered by his threatened departure: *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407; *Mattocks v. Tremain*, 3 Johns. Ch. 75. It is not sufficient for the affiant to state that he has reason to believe the defendant is about to leave the state, without stating the grounds upon which the belief is based: *Robinson v. Robinson*, 21 R. I. 81, 41 Atl. 1009. And in those states where no exeat issues against one about to remove his property from the state, it is not enough for the affiant to state that he is informed and believes the defendant is about to remove his property, but he should state the facts on which his belief is founded: *Wood v. Symmes*, 25 Ga. 69. A petition does not warrant the issuance of the writ when it fails to allege that the defendant is removing, or about to remove, beyond the limits of the state, either himself or his property, or the specific property in which the plaintiff claims an interest: *Reed v. Barber*, 110 Ga. 524, 35 S. E. 650.

It is not necessary, according to some authorities, to allege that the defendant is going abroad with the fraudulent purpose of evading payment of his debts: *King v. Huntley*, 2 Haw. 457; *Tanbuson v. Harrison*, 8 Ves. 32. Same authorities affirm, however, that the plaintiff must show, by facts stated and circumstances detailed in his petition, that the debtor is guilty of fraud, or that there is a strong presumption of fraud: *Malcolm v. Andrews*, 68 Ill. 100; *Jones v. Kennicott*, 83 Ill. 484; *Brophy v. Sheppard*, 124 Ill. App. 512. The fact that a debtor is trying to place his unexempt property beyond the reach of his creditors is such fraud as justifies his detention within this rule: *Garden City Sand Co. v. Gettins*, 102 Ill. App. 261; *Fitzgerald v. Gray*, 59 Ind. 254. If the facts stated show that the defendant's departure will defeat the complainant's claim, or that he is leaving for that purpose, it is unnecessary to allege, in so many words, that he is about to leave the state to avoid the jurisdiction of the court: *Yule v. Yule*, 10 N. J. Eq. 138.

c. **Filing of Bond by Complainant.**—Before the writ issues the complainant is required to file a bond for the payment of costs and any damages which the defendant may sustain: *Spivey v. McGehee*, 21 Ala. 417; *Stranghan v. Inge*, 5 Ind. 157; *Graham v. Noble*, 19 La. Ann. 512. In the event that the undertaking proves insufficient or defective, it may be remedied by filing a new one: *Fitzgerald v. Gray*, 59 Ind. 254. And the fact that no bond at all is given does not render the writ a nullity: *Bronk v. State*, 43 Fla. 461, 99 Am. St. Rep. 119, 31 South. 248. A bond given in Illinois is enforceable in Minnesota, and may there be the subject of a counterclaim in favor of the obligee: *Midland Co. v. Broat*, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312.

d. **Service of Ne Exeat.**—No subpoena is necessary if the writ is served: *MacDonough v. Gaynor*, 18 N. J. Eq. 249. Upon being arrested on a ne exeat, the defendant may immediately enter his appearance and demand a copy of the bill, without waiting for the service of a subpoena: *Georgia Lumber Co. v. Bissell*, 9 Paige, 225. In *Jewett v. Bowman*, 27 N. J. Eq. 275, a writ of ne exeat was declared void for service on Sunday, and the bond given thereon ordered to be canceled. In *Bushnell v. Bushnell*, 7 How. Pr. 389, where the writ was issued and served with the summons in the ordinary manner of issuing and serving an injunction, this was held sufficient, it not being necessary to file the complaint first.

e. **Return of Writ.**—In Indiana the writ should be made returnable to the first day of the term next after it issues: *Crocker v. Dunkin*, 6 Blackf. 535.

VII. Bail and Discharge of Defendant.

When a person is arrested by virtue of a writ of ne exeat, he may be discharged on giving a bond, either that he will not depart from the state, or that he will abide the decree of the court and pay the eventual condemnation of money, or by showing that the writ should not have issued: *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407; *McGehee v. Polk*, 24 Ga. 406; *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201; *Burnsides v. Blythe*, 50 Ky. (11 B. Mon.) 6; *Johnson v. Clendenin*, 5 Gill & J. 463; *Parker v. Parker*, 12 N. J. Eq. 105; *Myer v. Myer*, 25 N. J. Eq. 28; *Cary v. Cary*, 39 N. J. Eq. 3; *O'Connor v. Debraine*, 3 Edw. Ch. 230; *In re Griswold*, 13 R. I. 125; *Commissioners in Equity v. Phillips*, 2 Hill, 631; *Hyde v. Whitfield*, 19 Ves. 342. On issuing the writ the court directs the sum for which the officer is required to take security, which is marked upon the writ: *Harris v. Hardy*, 3 Hill, 393; *Gleason v. Bisby*, 1 Clarke Ch. 551; *Gibert v. Colt*, 1 Hopk. Ch. 496, 14 Am. Dec. 557; *Viadero v. Viadero*, 7 Hun, 313; *Denton v. Denton*, 1 Johns. Ch. 441. And on giving the security, the defendant is entitled to have the writ discharged as a matter of course: *Mitchell v. Bunch*, 2 Paige, 606, 22 Am. Dec. 669; *McNamara v. Dwyer*, 7 Paige, 239, 32 Am. Dec. 627. By consent of the parties he may be granted a leave of absence: *Dupont v. Goffe*, 1 Desaus. 143. The practice admits an application to the court for a discharge to be made upon affidavits and before answer; and the court, upon such motion, may make the discharge for want of equity in the bill, or insufficiency of the affidavits, or any other thing which shows that the writ should not have been granted: *Dithmar v. Dithmar*, 68 N. J. Eq. 533, 59 Atl. 644.

WAUKAU MILLING COMPANY v. CITIZENS' MUTUAL FIRE INSURANCE COMPANY.

· [130 Wis. 47, 109 N. W. 937.]

FIRE INSURANCE—Nonoperation of Mill.—A condition in a policy of insurance on a mill against any cessation of operation of the mill for ten consecutive days has no reference to such temporary cessations as occur in the usual course of business or arise from causes beyond the control of the insured. (p. 1001.)

FIRE INSURANCE—Nonoperation of Mill.—A condition in a policy of insurance on a mill that the nonoperation thereof for ten consecutive days will avoid the policy is not violated by a cessation of operation for want of water-power in the winter, when the fact that the mill could not be operated in severe winter weather on account of a lack of water-power was an existing fact known to the insurer at the time of issuing the policy. (p. 1005.)

FIRE INSURANCE—Application as Part of Contract.—The statute of Wisconsin providing that all fire insurance corporations, except mutual companies in cities and villages, shall, upon issuing a policy, attach to it a copy of any application which by the terms of the policy is made a part thereof, does not except from its operation mutual companies organized outside the state, but only those organized under the laws of Wisconsin. (pp. 1007, 1008.)

FIRE INSURANCE—Application as Part of Contract.—If an application for insurance addressed to a certain company contains a statement that a watchman is kept on the premises, but the agent splits up the insurance among the various companies which he represents, the application does not become a part of the contract between the insured and the companies to which it was not addressed. (p. 1008.)

John M. Whitehead, Thomas S. Nolan and Myron H. Beach,
for the appellants.

Barber & Beglinger, for the respondents.

49 **KERWIN, J.** The plaintiff Waukau Milling Company obtained insurance upon its mill and machinery under three separate policies with the defendants, one for two thousand dollars, in the Central Manufacturers' Mutual Insurance Company, of Van Wert, Ohio, and a policy in each of the other two defendant companies for one thousand dollars each. A loss occurred by fire, in consequence of which separate actions were commenced against each company. These actions were afterward consolidated. The plaintiff R. H. Hackett joined as mortgagee of the insured premises. Several defenses were raised in the answers, but were finally reduced to two, namely: 1. That the policies were avoided, because the mill ceased to be operated for more than ten consecutive days, contrary to the stipulation in the policies; 2. That the plaintiff failed to

keep a watchman on the premises at all times when the mill was not in operation. The case was tried by the court and a jury, and the following verdict returned:

“(1) Did Lorenze at the time he made application for insurance state to Brownell in substance that he expected that, during a part of the time in the following winter, the mill would not run on account of the weather? A. Yes.”

“(2) Did the mill run after the 29th of November, 1904, at all times when it was practicable to do so with the water which they then had? A. Yes.

“(3) Was the lack of water power during the winter due to any want of ordinary care and prudence on the part of the plaintiff or its officers and agents? A. No.”

Motions were made by both sides for judgment, and motions to set the verdict aside and for a new trial were made on behalf of defendants. Judgment was ordered and entered for plaintiffs upon the verdict for one thousand and fifty-eight dollars and seventy-five cents against each of defendants Citizens' Mutual Fire Insurance Company and Bower City Insurance Company, of Janesville, and against the Central Manufacturers' Mutual Insurance Company for two thousand and seventy-seven dollars and twenty-three cents. The judgment further provided that, at the time of issuing the policies and since, the plaintiff R. H. Hackett had an interest in the insured property as mortgagee, and at ⁵⁰ the time of trial this interest amounted to two thousand five hundred dollars, with interest at six per cent from October 8, 1904, and that there be paid to him as such mortgagee, two thousand five hundred dollars, and interest. From this judgment the defendants appealed.

The property covered by the policies in question consisted of a three-story water-power flour and feed mill building with equipments. It was located in Waukau, a small village in Winnebago county, Wisconsin, near a small creek which is fed by Rush lake. For several years prior to the date of the policies in suit the mill had been run only by water-power, and during the winter, when water-power was not available, it was not operated. The insurance was solicited by an agent of the companies named Brownell, who visited and examined the property November 9, 1904, accompanied by Mr. Lorenze, president of plaintiff Waukau Milling Company. Brownell knew that the mill was a water-power mill and the conditions and situation of the water-power, and that in severe weather the race which carried the water from the pond to

the mill would freeze and thereby prevent the operation of the mill. After examination of the property the agent took a written application from Mr. Lorenze for four thousand dollars of insurance on the property in the defendant Central Manufacturers' Insurance Company, of Van Wert, Ohio, the application being addressed to that company only, and forwarded the same to H. J. Cunningham, agent of the three companies, at Janesville, Wisconsin. Cunningham, instead⁵¹ of putting the insurance in the Central Manufacturers' Insurance Company, in accordance with the application, split it up, putting two thousand dollars in the Ohio company, and one thousand dollars in each of the other companies, and the three policies were forwarded to plaintiff Waukau Milling Company. The policies were all of the Wisconsin standard form, and none of them in any way referred to the application. This application was offered in evidence by defendants on the trial and ruled out. At the time the agent, Brownell, examined the premises the mill was not in operation, and did not commence to run until about three weeks thereafter. From November 29, 1904, to January 1, 1905, the mill was operated, but during the fore part of January, 1905, the weather became so severe that the water in the race froze, and, owing to the severity of the winter, plaintiffs were unable to operate the mill until about March 24, 1905, at which time they resumed operation. The policies were issued November 10, 1904. In March, 1905, Mr. Lorenze obtained from the defendants permission to make alterations and repairs and install additional machinery in the mill. This permission was granted in the form of a rider, which was attached to each policy, dated March 13, 1905. On March 30, 1905, the fire which destroyed the property occurred. The application for insurance to the Central Manufacturers' Insurance Company, of Van Wert, Ohio, heretofore referred to, contained question and answer to the effect that the plaintiff Waukau Milling Company kept a watchman on the premises at all times when the mill was not in operation.

1. It is claimed on the part of the defense that each policy became void because the mill ceased to be operated, contrary to the provisions of the policy. Each policy provides: "This entire policy, unless otherwise provided, by agreement indorsed hereon or added hereto, shall be void . . . if the subject of insurance be a manufacturing establishment and

. . . . if it cease to be operated for more than ten consecutive days."

⁵² The question, therefore, arises under this head, whether the failure to operate the mill for more than ten consecutive days because of lack of water-power occasioned by the severe weather rendered the policies void. The clause in the policy referred to must have a reasonable construction in the light of the conditions attending the subject matter of the contract and within the contemplation of the parties at the time the contract was made. It will be admitted that the provision is not an arbitrary one which will be enforced according to its letter and under all circumstances, regardless of whether the cause of such failure to operate is beyond the control of the assured, or whether the nonoperation be such as may fairly be said to have been within the contemplation of the parties when the contract was made as attending the use of the insured property. So it has often been held that a mere temporary cessation of operation due to natural causes is not a violation of a clause similar to the one under consideration: *Ladd v. Aetna Ins. Co.*, 147 N. Y. 478, 42 N. E. 197; *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116; *Bellvue R. M. Co. v. London & L. F. Ins. Co.*, 4 Idaho, 307, 39 Pac. 196. Where, as in the case at bar, it was known to the insurance company, at the time of issuing the policy, that the insured mill might, by reason of lack of power during the term covered by the policy, be forced to cease operation for a part of the season, it must follow that the period of such cessation must have been contemplated by the parties to the contract as not falling within the clause against cessation of operation. The cessation of operation covered by the policy manifestly has no reference to such as occurs in the usual course of the business, or such as arises from causes beyond the control of the insured. Here the evidence shows, and the jury found, that the defendants knew at the time the policies were issued that during the ensuing winter the mill might not run on account of weather conditions causing failure of water power, and that the mill did in fact run at all times practicable when it had power, and that the lack of power during ⁵³ the times it was not operated was not due to any want of ordinary care on the part of the milling company. So it seems clear that the parties contracted with reference to the existing conditions of the business, and contemplated that the mill might not be operated during part of the season on ac-

count of lack of power, and that such failure to operate would not come within the clause of the policies in question. Such clause cannot work a forfeiture because of failure to operate on account of conditions which must have been in contemplation of the parties when the contract of insurance was made. We think the great weight of authority supports the doctrine that the failure to operate under the circumstances in this case was not such a cessation of operation as is contemplated by the clause in the policies in question: *Ladd v. Aetna Ins. Co.*, 147 N. Y. 478, 42 N. E. 197; *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116; *Bellevue R. M. Co. v. London & L. F. Ins. Co.*, 4 Idaho, 307, 39 Pac. 196; *Rosencrans v. North American Ins. Co.*, 66 Mo. App. 352; *American F. Ins. Co. v. Brighton C. Mfg. Co.*, 125 Ill. 131, 17 N. E. 771; *City P. & S. M. Co. v. Merchants' etc. Ins. Co.*, 72 Mich. 654, 16 Am. St. Rep. 552, 40 N. W. 777; *Poss v. Western A. Co.*, 7 Lea, 704, 40 Am. Rep. 68; *May v. Buckeye M. Ins. Co.*, 25 Wis. 291, 3 Am. Rep. 76.

In *Ladd v. Aetna Ins. Co.*, 147 N. Y. 478, 42 N. E. 197, the policy covered a water-power sawmill building and machinery, and contained a stipulation similar to the one in question here. Operation ceased for about a month, owing to the illness of the sawyer. It was claimed that the policy was rendered void because the mill ceased to be operated for more than ten consecutive days, contrary to the provisions of the policy. The court held that the temporary shutting down of the mill on account of sickness of the operator did not constitute a violation of the policy. At page 484 (42 N. E. 198), the court said: "We are unable to agree with the defendant's contention that this clause of the policy is too clear for argument, and that any temporary cessation of the operation of the machinery ⁵⁴ in the manufacturing establishment by reason of sickness, breakdown, low water, or other unavoidable cause, although it is not the intent of the insured to cease operating or to allow the premises to become vacant or unoccupied, is a clear violation of its provisions."

In *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116, the policy contained the provision rendering it void in case the premises should become "vacant and unoccupied." In this case the mill was operated by water-power, and it was held that delays and interruptions incident to the business, such as low water, diminished custom, or derangement of machinery causing a temporary discontinuance of the use of the

mill, did not constitute a breach of the condition, or render the mill "vacant and unoccupied" within the meaning of the policy. At page 120, the court said: "The description in the policy shows that the defendant knew that the mill was operated by water-power, and as it was a sawmill, the insurer must be presumed to have known that sawmills are or may be used as well for custom work as for sawing the logs of the owner, and, as machinery was used for the operation of the mill, the fact that it was liable to break down and need repairs must also have been within the contemplation of the parties when the policy was issued. The interruptions of the business and the discontinuance of the active use of the sawmill by reason of low water, diminished custom, or derangement of the machinery, if held to be a violation of the condition and to create a vacancy and nonoccupation of the building within the true meaning of the condition, would greatly impair the value of the contract as a contract of indemnity, and the result would be that the contract would be deemed forfeited by the happening of events which might reasonably have been anticipated, and which were among the common incidents of the business carried on on the insured premises."

In *Bellevue R. M. Co. v. London & L. F. Ins. Co.*, 4 Idaho, 307, 39 Pac. 196, the clause in the policy was identical with those in the policies before us. The mill ceased to be operated because the mill race froze up in the winter, as it had ⁵⁵ for several years prior to the writing of the policy, which fact was known to the agent of the company before issuing the policy. It was held that the period of nonoperation was incident to the use of the mill and taken into consideration by the insurance company when it issued the policy. In *American F. Ins. Co. v. Brighton C. Mfg. Co.*, 125 Ill. 131, 17 N. E. 771, the policy contained a clause providing that, if the subject of insurance be a manufacturing establishment and ceased to be operated without agreement indorsed upon the policy, the insurance should cease. The property covered was a cotton-mill building and the plant necessary to run it. Operations were suspended, so far as running the mill was concerned, for about eight days before the fire because of difficulty in securing the proper quality of cotton. It was claimed that such suspension of operation was a ceasing to operate within the clause of the policy and avoided the insurance, but it was held that there was no cessation of operation within the meaning of the policy, but simply a tempo-

rary suspension of business. In *City P. & S. M. Co. v. Merchants' etc. Ins. Co.*, 72 Mich. 654, 16 Am. St. Rep. 552, 40 N. W. 777, the policy provided that if the mill should cease to be operated, unless shut down for repairs, without a notice to or consent of the company, the policy should become void. The mill was a shingle-mill and was operated in connection with a planing-mill. The shingle-mill had not been operated from July 29, to September 10, 1886, at which latter date it was burned. The mill was not operated because the stock of logs had been exhausted, and a new supply was expected from day to day, but their delivery was delayed on account of a low stage of water. It was held that the ceasing to operate was a mere temporary suspension, and that such suspension could not be regarded as a "ceasing to operate" within the meaning of the policy. In *Poss v. Western A. Co.*, 7 Lea, 704, 40 Am. Rep. 68, the factory shut down by reason of an epidemic of yellow fever, and was not in operation at the time of the fire. It was ⁵⁶ claimed that there was a ceasing to operate which rendered the policy void. It was held that the clause in the policy referred to a permanent, and not a temporary, cessation of operation of the establishment, and that such failure to operate occasioned by the epidemic was not a permanent cessation of operation, and therefore did not avoid the policy. Referring to this clause, the court said: "It could never have been intended to apply to a ceasing to operate occasioned by the usual incidents to the business, among which would be the impossibility of procuring operatives temporarily for any cause."

The doctrine of the foregoing cases is in harmony with the rule laid down by this court in *May v. Buckeye M. Ins. Co.*, 25 Wis. 291, 3 Am. Rep. 76.

We shall not extend this opinion by a review of the numerous cases cited to our attention by counsel for defendants, but may say in passing that they have received careful attention. Many of them rest upon the doctrine that evidence of parol agreements at or prior to the time of issuing the policy, or evidence of waiver of conditions as to future conduct respecting the subject matter of the insurance contrary to the provisions of the policy, is not admissible. Other cases cited recognize the distinction between agreements respecting waiver of conditions as to future conduct and knowledge of existing conditions respecting the property insured. In *Sowers v. Mutual F. Ins. Co.*, 113 Iowa, 551, 85 N. W. 763, the court

said: "While an insurance company may be bound by knowledge of its soliciting agent regarding past or present conditions, such an agent has no power to waive future conditions."

In *Stone v. Howard Ins. Co.*, 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771, the court said: "Where an existing fact is at variance with a clause of an insurance policy, and is known by the company to be so, ⁵⁷ there may be an implication that the clause is not insisted on: *Newmarket Sav. Bank v. Royal Ins. Co.*, 150 Mass. 374, 23 N. E. 210. But a clause which makes express provision for the future cannot be thus done away with."

In *McNierney v. Agricultural Ins. Co.*, 48 Hun, 239, at page 243, the court said: "It is now well settled that knowledge of an existing fact that would avoid the policy from its date will estop an insurer from insisting upon such fact as a breach of a warranty: *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138."

The point was considered by the court in *Welch v. Fire Assn.*, 120 Wis. 456, 98 N. W. 227, where it is said: "In *Roberts v. Continental Ins. Co.*, 41 Wis. 321, after citing a long line of decisions in this court, it was said, in effect, that if, when the agent of an insurance company delivers a policy of insurance, he has knowledge of facts as regards the subject of the insurance inconsistent with the terms of the policy, the assurer, by accepting the premium, is estopped from declaring the policy void, because the terms thereof were not so changed in the writing as to conform to the facts," and citing a long line of decisions to that effect.

The fact that the mill could not be operated in severe winter weather on account of lack of power was an existing fact and known to the companies at the time of issuing the policies. The provision, therefore, respecting nonoperation had no reference to temporary cessation of operation occasioned by lack of power.

2. The defense that no watchman was kept in the mill turns upon whether the application to the defendant Ohio company was admissible and binding upon the plaintiff. None of the policies refer to this application or require the keeping of a watchman, so, unless the application is a part of the contract, there was no requirement for a watchman, and hence no violation of the policy for failure to keep one in the ⁵⁸ mill. The application was addressed to the Ohio company and made no

reference to the other companies or the Janesville agency. It called for four thousand dollars insurance in the Ohio company for five years, and contained the following provision: "And the applicant hereinbefore named, by accepting this policy, bearing even number and date herewith, becomes a member of this company and agrees to pay it the premium annually during the life of this policy, and, in addition thereto, such sum or sums, in no event to exceed in the aggregate five times the amount of said annual premium, at such time or times, in such manner, and by such installments as the directors of said company shall assess or order, pursuant to its charter and by-laws and the laws of the state of Ohio. And warrants the answers to the above questions to be full, true, and material to the risk and shall be continuing warranties during the life of said policy; and this application is made the basis upon which said policy is issued and becomes a part of same."

The application was excluded by the court below, and the ruling in that regard is complained of. It is claimed that the application was admissible as to the Ohio company, because it was a "mutual company in cities and villages" within the meaning of section 1945a of the Statutes of 1898. The statute provides: "All fire insurance corporations except town insurance corporations, millers' and manufacturers', mutual companies in cities and villages, druggists' mutual companies, church insurance corporations, and retail lumber dealers' insurance associations, shall upon the issue or renewal of any policy, attach to such policy or indorse thereon a true copy of any application or representations of the assured which by the terms of such policy are made a part thereof or of the contract of insurance or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any corporation neglect to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving ⁵⁹ such application or representations, or any part thereof, or the falsity thereof or any part thereof in any action upon such policy; and the plaintiff in any such action shall not be required in order to recover either to plead or prove such application or representations, but may do so at his option."

It is claimed by counsel for the Ohio company that "mutual companies in cities and villages," within the meaning of

this statute, includes the defendant Ohio company organized under the laws of Ohio, and hence that it could prove the application and the falsity thereof, although not attached to the policy, or referred to therein. A careful examination of the statutes respecting mutual fire insurance companies in this state and the history of such legislation convinces us that sections 1941—1 to 1941—13, respecting “mutual companies in cities and villages,” have reference to companies organized under the laws of this state only, and that “mutual companies in cities and villages” mentioned in section 1945a refer to such companies organized under the laws of this state. These several mutual fire insurance companies excepted from the operation of section 1945a (“town insurance corporations, millers’ and manufacturers’, mutual companies in cities and villages, druggists’ mutual companies, church insurance corporations and retail lumber dealers’ insurance associations”) manifestly have reference to local companies and associations within the limits of the state and authorized to organize under the laws of the state for mutual protection. Their powers are defined by statute. They are obviously intended to provide for classes of persons having, by reason of location, occupation, or association, a mutual interest in fire protection. Section 1941—1 of the Statutes of 1898, provides, in effect, that any number of persons, not less than twenty-five, residing in any city or cities, village or villages, in the same county, who shall own collectively insurable property of not less than twenty-five thousand dollars in value, which they desire to have insured, may form themselves into a corporation for mutual insurance by complying with the conditions named, which include the ⁶⁰ signing of articles of organization, reciting that they are residents of a certain city or cities or villages in some county in the state of Wisconsin; and section 1941—5 provides, substantially, that no such corporation shall insure any property out of the city or village in which it is located, unless a resolution be adopted by a majority of the members authorizing the directors to insure property in other villages and cities than that in which the corporation is located, and in cities and villages of counties adjoining such county. It is plain that these “mutual companies in cities and villages,” restricted in their scope and powers as they are, were intended by the legislature to refer to mutual companies organized in cities and villages in this state, and have no reference to foreign mutual fire insurance companies. There is nothing in the

statute to indicate that it was the intention of the legislature that sections 1941—1 to 1941—13 should apply to corporations organized outside of the limits of the state of Wisconsin, and hence we must presume that these statutes have no operation beyond the territorial limits of the state, and apply only to persons and things in this state: 23 Am. & Eng. Ency. of Law, 1st ed., 346 (bottom); *Butterfield v. Ogborn*, 1 Disn. 550; *Story's Conflict of Laws*, secs. 18-20; *Chappell v. Purday*, 14 Mees. & W. 303. In *Farnum v. Blackstone Canal Corp.*, 1 Sum. 46, Fed. Cas. No. 4675, Story, J., says: "Every legislature, however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty."

Respecting the Janesville companies organized under the laws of this state, the application was not made to them. They cannot be said to be parties in any sense to the application made exclusively to the Ohio company, and therefore it was properly excluded as to them. The policies issued by the Janesville companies were for one thousand dollars each for the term of one year. They in no way referred to the application, which was made to the Ohio company for four thousand dollars insurance for five ⁶¹ years. It cannot be said that the Janesville policies were issued upon the application to the Ohio company or that such application was an application to the Janesville companies. The plaintiff Waukau Milling Company, therefore, did not contract with the Janesville companies that it would keep a watchman in the mill: *Vilas v. New York C. Ins. Co.*, 72 N. Y. 590, 28 Am. Rep. 186.

We therefore hold that there was no proof that the plaintiff Waukau Milling Company agreed to keep a watchman in the premises, and that there was no breach of the provision in the policies respecting cessation of operation. It follows, therefore, that the judgment of the court below must be affirmed.

By the Court. The judgment is affirmed.

A Condition in a Policy of Fire Insurance forbidding the cessation of the operation of the insured establishment without the consent of the insured is valid: *Dover Glass etc. Co. v. American Fire Ins. Co.*, 1 Marv. 32, 65 Am. St. Rep. 264. As to the application of such a condition to machinery and other property of a personal nature, see *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 73 Am. St. Rep. 532; *Threshing Machine Co. v. Firemen's Ins. Co.*, 57 Minn. 35, 47 Am. St. Rep. 572. The temporary closing of a mill for want of logs to

manufacture, they being detained by low water, does not avoid the policy: *City Planing etc. Co. v. Merchants' etc. Ins. Co.*, 72 Mich. 654, 16 Am. St. Rep. 552. To the same effect, see *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116. And the temporary cessation of operations in a manufactory occasioned by the prevalence of yellow fever does not avoid the insurance thereon: *Poss v. Western Assur. Co.*, 7 Lea, 704, 40 Am. Rep. 68.

EVANS v. CRAWFORD COUNTY FARMERS' MUTUAL FIRE INSURANCE COMPANY.

[130 Wis. 189, 109 N. W. 952.]

FIRE INSURANCE—Unconditional Ownership.—A vendee in possession of premises under an executory contract of purchase has an interest of sufficient dignity to satisfy the calls of an insurance policy as to the interest of the insured being entire, unconditional, and sole ownership. (p. 1012.)

FIRE INSURANCE—Right of Vendor to Proceeds.—If the owner of insured property agrees to transfer it, but the transfer is not consummated until the buildings are destroyed by fire, he is entitled to recover on the policy of insurance. (p. 1013.)

VENDOR AND VENDEE.—The Doctrine of Relation carries a transfer of real estate back to the date of the executory agreement therefor, so far as necessary to protect the equitable rights of the vendee; but strangers to the transaction cannot invoke the doctrine. (p. 1014.)

VENDOR AND VENDEE—Transfer by Operation of Law—Doctrine of Relation.—In case of a transfer of title by mere operation of law upon the acts of the parties, the change of title occurs at the instant all the circumstances exist requisite thereto, but no earlier, except in so far as the operation of the doctrine of relation may be necessary to protect the vendee and those in privity with him. (p. 1014.)

HUSBAND AND WIFE—Wife as Agent of Husband.—If a husband absents himself from home and keeps his whereabouts unknown, his wife becomes his agent by implication of law to do those things customarily delegated by husbands to their wives under similar circumstances. Beyond this she cannot bind him as agent ex necessitate, regardless of whether her attempt to do so is judicious from a business standpoint. (p. 1015.)

HUSBAND AND WIFE.—The Authority of a Wife as Agent for her husband by implication of law during his absence does not extend to transferring his real estate. (p. 1015.)

HUSBAND AND WIFE—Wife as Agent—Ratification by Husband.—When a wife, assuming to act for her husband but without authority so to do, contracts for her own benefit rather than for his, ratification by him does not spring from neglect to disavow, but from some affirmative recognition of her act as having been done by authority. (p. 1016.)

FIRE INSURANCE—Proof of Loss by Wife.—When a husband is absent from home and cannot be informed of the destruction of his house by fire, his wife in charge of the property may make proof of loss by his implied authority as his agent *ex necessitate*. (p. 1016.)

FIRE INSURANCE—Proof of Loss by Wife.—False swearing by a wife in making proofs of loss as agent *ex necessitate* for her husband does not work a forfeiture of the insurance when not subsequently ratified by him. (p. 1017.)

Graves & Earll and Charles H. Schweizer, for the appellant.

Grotophorst, Evans & Thomas and Howe & Gilman, for the respondent.

¹⁹⁰ MARSHALL, J. Action to recover on an insurance policy. The complaint was in due form for the recovery of loss by fire insured against by the contract contained in the policy. The defendant answered, among other things, that plaintiff had no insurable interest in the dwelling-house, which was insured for \$600, and that he forfeited all right to recover by reason of false swearing in making proofs of loss. The policy contained conditions on both of such subjects. The evidence was to the effect that plaintiff purchased the farm upon which the dwelling-house insured was located at the agreed price of \$4,600, \$600 being paid down, and the vendor, A. J. Haggerty, ¹⁹¹ giving plaintiff a land contract in the usual form. The plaintiff went into possession and made permanent improvements on the farm to the value of about \$1000. About a year and a half after the purchase was made, during which time plaintiff paid interest to the amount of \$240, it was agreed between the parties to the contract and one Kane that the latter should take a deed of the premises from Haggerty and make a new land contract to the plaintiff similar to the one made by Haggerty, and that the former should be substituted for the latter. That agreement was carried out, the new contract bearing date October 3, 1901, or about six months prior to the actual transaction between Kane, plaintiff, and Haggerty. January 23, 1902, plaintiff took out the insurance policy through the agency of Mr. Kane, insuring the dwelling-house for \$600, the household furniture therein and household goods for \$300, and provisions to the amount of \$50. Several months thereafter plaintiff received an injury from which blood poisoning set in and he left home and remained away, his whereabouts being unknown for

about a year, when it was discovered that he was being cared for as an insane person in an asylum at Danvers, Massachusetts. Some time thereafter he recovered his normal condition and returned to his home. During his absence and on March 1, 1903, taxes upon the land and interest upon the land contract being in default, and Mrs. Evans being somewhat embarrassed in respect to caring for the property, Mr. Kane proposed to give her \$100 for a surrender of the property to him. She expressed a willingness to accept the proposition upon condition of her having till April 1, 1903, to dispose of her personal property, Mr. Kane to deposit the \$100 with Thomas Coughlin and she to deposit with him the land contract and to vacate the premises in thirty days, the money and contract to be then delivered to the parties entitled thereto. The money and contract were deposited accordingly, but the contract was not deposited till after the fire occurred. Mrs. 192 Evans subsequently took the \$100 and Mr. Kane took the contract. Proofs of loss under the policy were made by Mrs. Evans as agent for her husband, aided by Mr. Sime, president of the defendant company. Before plaintiff returned she commenced an action in his name to recover the loss. After such return the litigation was conducted by his direction. The cause was submitted to the jury for a special verdict containing questions agreed upon by counsel to cover the matters in controversy. The verdict rendered was as follows:

“(1) Did the plaintiff’s wife, Mary Evans, knowingly and with intent to defraud the defendant company, make any false statements in the proofs of loss submitted to the defendant company, in regard to the amount, value, or condition of any of the property damaged or destroyed by the fire on March 5, 1903? A. No.

“(2) Did the plaintiff keep a good ladder of sufficient length to reach the roof of his dwelling-house in the immediate vicinity of said house? A. Yes.

“(3) If you answer the second question ‘yes,’ answer this question: Was said ladder in the immediate vicinity of said house at the time of the fire? A. Yes.

“(4) Was the plaintiff’s dwelling-house provided with a scuttle or other means of reaching the under side of the roof from the inside of the house? A. Yes.

“(5) If the court should finally decide upon your findings and the law applicable to this case that the plaintiff is entitled to recover, at what sum do you assess the value of the personal property damaged or destroyed by said fire, to wit: (A) At what sum upon the household furniture? A. Fifty-one dollars and twenty-six cents. (B) At what sum upon the wearing apparel? A. Fifty dollars. (C) At what sum upon the bedding? A. Twenty-five dollars. (D) At what sum upon the provisions? A. Twenty-five dollars.”

Defendant's counsel moved the court to change the answer to the first question from “No” to “Yes” and to strike out the answer to the fifth question, and for judgment in favor of the defendant on the verdict as so corrected. As an alternative defendant's counsel moved the court upon the exceptions taken on the trial to set aside the verdict and grant a new trial, and further to set aside the verdict and grant a ¹⁹⁸ new trial upon various other exceptions specified. The motions were overruled. Thereafter judgment was rendered in favor of the plaintiff according to the special verdict and the defendant appealed.

Respondent was the owner of the land on which the dwelling-house mentioned in the policy was situated when the insurance was effected. He was in possession thereof under a land contract, was not in default, and had made some payments on such contract, and also had made valuable improvements on the land. The equitable ownership was in him, the legal title only being in his vendor in trust to secure the unpaid purchase money. That made him to all intents and purposes the owner of the premises, his interest being of sufficient dignity to satisfy the calls of a policy as to the interest of the insured being entire, unconditional, and sole ownership: *Johannes v. Standard F. Office*, 70 Wis. 196, 5 Am. St. Rep. 159, 35 N. W. 298; *Wolf v. Theresa V. Mut. F. Ins. Co.*, 115 Wis. 402, 91 N. W. 1014. That situation was not efficiently changed prior to the destruction of the dwelling-house by fire, unless the contract right to such property was theretofore extinguished by the acts of respondent's wife. Thus far there does not seem to be any controversy in the case.

It follows that when Mrs. Evans proposed to Mr. Kane, the then executory vendor, to surrender her husband's interest in the land for \$100, upon condition of her being allowed till the first day of the succeeding April to dispose of the per-

sonal property thereon, and the deposit was made with a mutual agent of the \$100 by Mr. Kane, and of the land contract by Mrs. Evans, she to draw the money and Kane to ¹⁹⁴ obtain the contract, upon surrender of the property being made, respondent was the owner of such property, and such ownership was not subject to extinguishment except by act or operation of law, or by deed or conveyance in writing subscribed by him or by his lawful agent thereunto authorized in writing: Stats. 1898, sec. 2302. An authorized surrender of the contract to Kane and delivery of possession of the premises to him and acceptance thereof with intention to extinguish the contract right would have satisfied the requisites of the statute as to transfer by operation of law.

It is contended by appellant's counsel that the agreement and deposit of the money before the fire, and the agreement and the withdrawal of the money by Mrs. Evans and abandonment of the land by her after the fire, satisfied all the requisites of a transfer of an interest in realty by operation of law as of the date of the agreement, so that when the property was destroyed, plaintiff had no insurable interest therein and so could not legitimately recover on the policy.

Now, assuming, for the moment, that Mrs. Evans had authority to dispose of her husband's realty, as it is claimed she did, we are unable to see that there was a transfer thereof before the fire; and how a transfer thereafter could antedate the fire and supersede the cause of action on the policy which became fixed thereby, subject to conditions precedent as to enforcing the same, is not perceived. If the position of appellant be correct, then in any case where the owner of land on which there is a building insured against loss by fire gives a contract to another to sell the property to him, the sale to be consummated at a time stated, but in the meantime such owner to remain in possession, and before the time arrives for such consummation the building is destroyed by fire, if the parties see fit to carry out their agreement, nevertheless, and do so, neither one of them can recover for the loss. The new one cannot because he was not the one insured, and the former cannot, though he owned the property at the time ¹⁹⁵ of the fire, because his ownership was thereafter divested pursuant to an agreement made before the fire. We are not referred to any principle or authority to support that view. It is rather assumed the surrender of the premises to Mr. Kane, if there was such surrender in fact, and the withdrawal

by Mrs. Evans after the fire of the \$100 from the mutual agent, and deposit with him of the contract, by relation, operated to terminate plaintiff's interest in the land before the fire and as of the date of the agreement.

It is quite familiar that if one agrees, even verbally, to a sale of real estate and afterward executes the agreement by conveying the land, for the purpose of protecting the equitable right of the executory vendee, the deed will be regarded as having taken effect as of the date of the agreement: 24 Am. & Eng. Ency. of Law, 2d ed., 276. Thus, though the actual transfer of the realty occurs at the time of the performance of the last act requisite thereto, by a fiction in the law, it is carried back, if necessary to do justice between the parties, to the date of the agreement consummated by the transfer, but that has no reference to the rights of either party to the transaction as regards strangers thereto. In *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. 17, lands on which there was an insured building were sold under judicial proceedings requiring confirmation to consummate the sale. After the sale and before such confirmation the buildings were injured by fire. Upon such confirmation and a deed being made pursuant thereto, by the doctrine of relation the transition of the land, for some purposes, was carried back to the date of the sale, but not so as to make any change in the legal relations between the former owner and the insurance company, which became fixed in the meantime. It was held that the cause of action to recover on the policy accrued to the former owner. This court held in *Stahl v. Lynn*, 86 Wis. 75, 56 N. W. 188, that the doctrine of relation is only invocable by one person against another with whom he is in privity as regards the particular contract. The conclusion on this branch of the appeal must be that in case of a transfer of title to realty by mere operation of law upon the acts of the parties, the change of title occurs at the instant all the circumstances exist requisite thereto. The law, in legal contemplation, executes the will of the parties, and as it cannot operate till the last act on their part shall have occurred, indicating irrevocably such will, that is the earliest moment at which by such operation the transition of title takes place. In the meantime the former owner, except as the equitable doctrine of relation may be necessary to protect the latter and those in privity with him, remains the owner of the property.

What has been said really renders unnecessary the question of whether Mrs. Evans had authority to sell her husband's interest in the realty and convey the same to Kane, but we will briefly give attention to that subject.

The rule is familiar that a wife, under some circumstances, may act to some extent as agent by implied appointment for her husband, and that such is the case when the latter had left his property in possession of the former with no one to care therefor but her. In such a case the authority of the wife is not referable merely to the marital relation, for she has no authority to bind her husband by contract, generally, on that account. The authority springs from the apparent necessities of the situation and is limited in its scope to that which, under the circumstances, can be reasonably presumed to be the intention of the husband. Her power to act at all is referable to a presumption of appointment and is fenced about, as in case of any other agency, by the apparent authority appropriate under the circumstances. In short, in contemplation of law, the authority of the wife is based on the presumed intention of the husband. As that rests wholly in mere presumption, it goes no further than the customary authority which husbands usually confer under the same or similar circumstances. A very interesting discussion of that ¹⁹⁷ subject is found in *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384, cited to our attention by counsel. Beyond the authority mentioned the wife cannot bind her husband as agent *ex necessitate*, regardless of whether her attempt to do so is or is not a judicious one from a business standpoint.

True, as said in effect in *Felker v. Emerson*, 16 Vt. 653, 42 Am. Dec. 532, in case of extraordinary circumstances the presumed authority of the wife extends to all reasonable methods of meeting the extreme situation, but that is because such would be the natural inference as to what a husband would authorize to be done under such circumstances. But would that extend to permitting the wife in her discretion to sell the husband's real estate? We think not. It has never been held that it would so extend by any court that has dealt with the subject, so far as we can discover. Husbands do not usually, when absenting themselves from home so as to leave the entire care of their property to their wives, give the latter authority, in their own judgment, under any circumstances to sell and convey the realty. No such authority can be implied from the unexplained absence of the husband for any

length of time. We state that as a legal principle, ~~is~~ ^{is} established by the fact that there are no precedents ^{an} contrary, and the fact that the requisites to a transfer ^{ag} are such that authority of an agent to make such ^a ~~an~~ ^g cannot rest on mere implication. That is consistent ^{ger} said in *Butts v. Newton*, 29 Wis. 632, and the other ^{ic} ~~is~~ called to our attention by appellant's counsel.

But it is argued by appellant's counsel that in unauthorized transfer by a wife of her husband's he will be bound unless he seasonably disavows her ~~act~~ to that authorities are cited to the effect that when the absence of her husband contracts for his benefit, ~~and~~ ^a benefit comes to his possession, he will be bound unless ~~he~~ ^{he} a reasonable time after becoming acquainted with the ~~fact~~ he disavows her act: *Hill v. Sewald*, 53 Pa. 271, 91 ^{A. M.} 209; *Berwick* ¹⁹⁸ ~~v.~~ *Dusenberry*, 32 How. Pr. 37. ~~It~~ hardly fits this case, because the proof does not show benefit of Mrs. Evans' contract came to the hands ~~of~~ ^{of} ~~the~~ ^{the} ~~agent~~ ^{agent}. When a wife, assuming to act for her husband ~~but~~ ^{but} without authority so to do, contracts for her own benefit ^{ration} ~~ration~~ does not spring from neglect to disavow, but from ~~an~~ ^{an} affirmative recognition of her act as having been done ~~with~~ ^{with} authority.

Error is assigned because the court refused to change ~~the~~ ^{the} answer to the first question of the special verdict so as to find Mrs. Evans was guilty of knowingly and with fraudulent intent swearing falsely in regard to the personal property destroyed, and further error is assigned as to instructions of that branch of the case. In our view neither of such assignments of error is important.

It is conceded that Mrs. Evans had authority, presumably from her husband, to make the proofs of loss. He was absent from home. He did not know of the fire till long after the time required for making the proofs. She was left in charge of the property. Under those circumstances it is held that the wife may make the proofs of loss by implied authority of the husband, as his agent ex necessitate: *O'Connér v. Hartford F. Ins. Co.*, 31 Wis. 160. The appellant in this case recognized that rule, received the proofs of loss made by Mrs. Evans, and defended upon the ground that fraudulent false swearing by the agent in such a case without the knowledge of the principal, in doing that which the former by implied authority is authorized to do in a proper manner, is to all in-

legal principle: purposes the fraud of the latter; that the employ-
 ee no precede an agent carries with it apparent authority to do all
 tes to a trans agent does in carrying out the object of the agency.
 to make such a general rule is that a principal is bound by the acts
 at is consist agent within the scope or object of the employment,
 and the other which acts include false and fraudulent representations
 counsel the course of such employment to accomplish its ob-
 noel that it which the principal has no knowledge: ¹⁰⁰ Mechem
 or husband y, sec. 743; Cobb v. Simon, 124 Wis. 467, 102 N. W.
 disavows: ever, it is considered that the law is somewhat more
 t that wh the interests of a principal who makes no appoint-
 or his be of an agent in fact, but for whose benefit the law raises
 bound application of one, as in this case; that, on principle, the
 intend the of the employment does not include acts which will de-
 Pa. 271. the very equity of the law in respect to the implied
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rather answer to counsel's contention above discussed
 at the construction of the policy clause to the effect
 fa swearing on the part of the assured will work a
 eitue adopted in Metzger v. Manchester F. Assur. Co.,
 Mich. 334, 63 N. W. 650, is sound as regards an agency
 necessitate. We go no further than the facts of this case
 adopting that view. That court held, under the rule that
 forfeitures are not favored in the law, that the policy clause
 referred to should be strictly construed and held not to apply
 to false swearing on the part of the agent for the assured,
 unless the latter is actually a party to the deceit by either
 authorizing it in advance or subsequently ratifying it. To the
 same general effect is Mullin v. Vermont Mut. F. Ins. Co., 58
 Vt. 113, 4 Atl. 817. There it was held that the principal
 participated in the deceit of his wife, who acted as his agent,
 by taking her statement of household effects lost by fire and
 swearing to it as true without investigation. In the instant
 case it must be remembered that there was neither an express
 turning over by the principal to the wife as agent, of the mat-
 ter of making the proofs of loss, nor a careless omission to
 verify her statement before it was delivered to the appellant.
 There was merely an agency, implied by law—one arising from
 the necessities of the case to do the act essential to preserve
 the cause of action under the policy, to recover for the loss.
 In such circumstances nothing short of ratification with knowl-
 edge of the facts should be held to operate as an adop-

tion ²⁰⁰ by the principal of the acts of the agent outside those necessary to execute the object of the agency.

It is claimed that respondent did ratify what was done by his wife in taking up the litigation commenced by her, after his return, and pursuing it to judgment without withdrawing so much of the claim as was fraudulently made, if any. It does not seem so. He found the cause of action at issue in respect to the claim of fraud. There is nothing to show that he did not take up the matter, in good faith, where he found it. He was not obliged, at his peril, to take the allegations which he found in appellant's answer as true. The questions as agreed upon, submitted to the jury, did not contain any inquiry on this subject. So it must be assumed, from the attitude of counsel at the trial, that there was no such question then supposed to be involved. Certainly, under the circumstances, there was no ratification as a matter of law, and the court did not commit any error in not submitting to the jury a question in respect to the subject, as matter of fact.

As before indicated, our view of the case renders it unnecessary to discuss the subject argued at much length in the briefs of counsel as to whether the answer to the first question in the special verdict has credible evidence to support it. We do not pass on that. If the proofs of loss included property not injured or destroyed, it was all eliminated by the verdict, and the inclusion of it, whether by mistake or fraud, under the circumstances, did not work a forfeiture as to the respondent.

By the Court. The judgment is affirmed.

The Ownership of Property is Sole and Unconditional, within the meaning of a fire insurance policy, though the owner has made a contract to sell the land, which has not yet been performed: *National Fire Ins. Co. v. Three States Lumber Co.*, 217 Ill. 115, 108 Am. St. Rep. 239; *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 77 Am. St. Rep. 129; *Garner v. Milwaukee etc. Ins. Co.*, 73 Kan. 127, 117 Am. St. Rep. 460. Compare *Skinner etc. Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485. And a vendee in possession under an executory contract of purchase is regarded as the sole and unconditional owner: *Baker v. State Ins. Co.*, 31 Or. 41, 65 Am. St. Rep. 807; *Insurance Co. v. Pitts*, 88 Miss. 587, 117 Am. St. Rep. 756.

The Implied Authority of Wife to Act for her husband and bind him by her contracts is discussed in the note to *Wanamaker v. Weaver*, 98 Am. St. Rep. 627.

TOPOLEWSKI v. STATE.

[130 Wis. 244, 109 N. W. 1037.]

CRIMINAL LAW.—Mere Hearsay Evidence, subject to some exceptions, is never allowable, and the admission of it is presumed prejudicial. (p. 1021.)

CRIMINAL LAW.—On the Trial of a Person for One Offense Evidence that he has committed other distinct offenses is incompetent and generally prejudicial. (pp. 1021, 1022.)

CRIMINAL LAW.—The Admission of Improper Evidence in a case tried to the court is regarded on appeal as harmless, unless it clearly appears that but therefor the finding would probably have been different. (p. 1022.)

LARCENY—Consent of Owner.—Where the owner of property, by himself or his agent, actually or constructively aids in the commission of an intended larceny, by performing or rendering unnecessary some act in the transaction essential to the offense, the would-be criminal is not guilty of all the elements of the crime. (p. 1025.)

LARCENY—Consent of Owner—Absence of Trespass.—If one procures his property to be taken by another intending to commit larceny, or in practical effect delivers his property to such other, the latter purposing to commit such crime, the element of trespass is wanting and the crime is not fully consummated, however plain may be the guilty purpose of the one possessing himself of the property. (pp. 1025, 1026.)

Blenski & Cordes and Lenicheck, Fairchild & Boesel, for the plaintiff in error.

L. M. Sturdevant, attorney general, and A. C. Titus, assistant attorney general, for the defendant in error.

245 MARSHALL, J. The accused was charged with having stolen three barrels of meat, the property of the Plankinton Packing Company, of the value of fifty-five dollars and twenty cents, and was found guilty. The cause was appealed to and tried in the municipal court of Milwaukee county on evidence taken in the lower court, a jury being waived. The accused was again convicted and sentenced, as before, to pay a fine of one hundred dollars, and forty-two dollars and eighty-four cents, costs of prosecution, and to be committed to the house of correction of Milwaukee ²⁴⁶ county until such payment should be made. There was a motion to set aside the conviction and for a new trial and also a motion in arrest of judgment. Both motions were denied. The fine and costs were paid under protest, to avoid the consequences as to imprisonment.

The evidence was to this effect: The Plankinton Packing Company suspected the accused of having, by criminal means, possessed himself of some of its property and of having a purpose to make further efforts to that end. A short time before the fourteenth day of October, 1905, one Mat Dolan, who was indebted to the accused in the sum of one hundred dollars, was discharged from the company's employ. Shortly theretofore the accused pressed Dolan for payment of the aforesaid indebtedness, and, the latter being unable to respond, the former conceived the idea of solving the difficulty by obtaining some of the company's meat products through Dolan's aid, and by criminal means, Dolan to participate in the benefits of the transaction by having the value of the property credited upon his indebtedness. A plan was accordingly laid by the two to that end, which Dolan disclosed to the company. Such plan was abandoned. Thereafter various methods were discussed of carrying out the idea of the accused, Dolan participating with the knowledge and sanction of the company. Finally a meeting was arranged between Dolan and the accused to consider the subject, the packing company requesting the former to bring it about, and with knowledge of Dolan causing one of its employes to be in hiding where he could overhear whatever might be said, the arrangement being made on the part of the company by Mr. Layer, the person in charge of its wholesale department. At such interview the accused proposed that Dolan should procure some packages of the company's meat to be placed on their loading platform, as was customary in delivering meat to customers, and that he should drive to such platform ostensibly as a customer, and remove such packages. Dolan agreed to the ²⁴⁷ proposition and it was decided that the same should be consummated early the next morning, all of which was reported to Mr. Layer. He thereupon caused four barrels of meat to be packed and put in the accustomed condition for delivery to customers, and placed on the platform in readiness for the accused to take them. He set a watch over the property and notified the person in charge of the platform, who was ignorant of the reason for so placing the barrels, upon his inquiring what they were placed there for, to let them go; that they were for a man who would call for them. About the time appointed for the accused to appear, he drove to the platform and commenced putting the barrels in his wagon. The platform boss supposing, as the fact was, that the ac-

cused was the man Mr. Layer said was to come for the property, assumed the attitude of consenting to the taking. He did not actually help load the barrels onto the wagon, but he was by, consented by his manner, and, when the accused was ready to go, helped him arrange his wagon, and inquired what was to be done with the fourth barrel. The accused replied that he wanted it marked and sent up to him with the bill. He told the platform boss that he ordered the stuff the night before through Dolan. He took full possession of the three barrels of meat with intent to deprive the owner permanently thereof and without compensating it therefor, wholly in ignorance, however, of the fact that Dolan had acted in the matter on behalf of such owner, and that it had knowingly aided in carrying out the plan for obtaining the meat.

²⁴⁸ Evidence was allowed of a hearsay character that the accused, prior to the occurrence in question, had been a party to criminally appropriating property of the packing company. Mr. Layer was permitted to testify that the accused at one time conspired with Peter Juston to so obtain some of its property and succeeded in that regard, as said Juston informed the witness, and as was indicated by the books kept by Juston and papers manipulated by the latter. Juston was permitted to testify to such unlawful appropriation of property so far as the purpose of the accused had to do with the transaction. More hearsay evidence, subject to some ²⁴⁹ exceptions not important here, is never allowable and the admission of it is presumed to be prejudicial, unless the contrary clearly appears. Again, on the trial of a person for a particular offense, evidence tending to prove that he has committed other distinct offenses is incompetent and generally prejudicial: *Albricht v. State*, 6 Wis. 74; *Fossdahl v. State*, 89 Wis. 482, 62 N. W. 185; *Boldt v. State*, 72 Wis. 7, 38 N. W. 177; *Paulson v. State*, 118 Wis. 89, 94 N. W. 771; *Barton v. Bruley*, 119 Wis. 326, 96 N. W. 815; *Holmes v. State*, 124 Wis. 133, 102 N. W. 321.

When a person is charged with being guilty of a particular offense he has a right, which should not be trespassed upon at all, to have the evidence in support of such charge confined to that particular offense. That, of course, has nothing to do with the rule allowing evidence of a former conviction as bearing on the subject of credibility of the accused in case of his offering himself as a witness, nor the rule permitting proof of other offenses so intimately connected with the one

charged as to be evidentiary of the intent essential. Cases of the latter character too often lead to the improper admission of evidence contrary to the general rule above stated.

Notwithstanding the foregoing, the admission of the improper evidence does not give cause for a reversal here. In a case tried by the court the admission of improper evidence is to be regarded on appeal as having been harmless, unless it clearly appears that but therefor the finding would probably have been different: *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909. We are unable to see any clear indication that the plaintiff in error was prejudiced by the error in this case. If the judgment is fatally tainted with error, the fault lies in a misconception of the law as regards trespass being essential to the crime of larceny, or as to, under what circumstances, in regard to the conduct of the owner of the subject of the larceny, such element does not exist.

It was frankly conceded on the oral argument by the ²⁵⁰ learned attorney general that if the plaintiff in error committed the crime of larceny, Dolan, the decoy of the packing company, was a guilty participant in the matter, unless the element of guilt on his part was absent, because, while in the transaction he acted ostensibly as an accomplice of the accused, his acts were in fact those of the packing company. So in the circumstances characterizing the taking of the barrels of meat from the loading platform the case comes down to this: If a person procures another to arrange with a third person for the latter to consummate, as he supposes, larceny of the goods of such person, and such third person in the course of negotiations so sanctioned by such person suggests the plan to be followed, which is agreed upon between the two, each to be an actor in the matter, and subsequently that is sanctioned secretly by such person, the purpose on the part of the latter being to entrap and bring to justice one thought to be disposed to commit the offense of larceny, and such person carries out a part of such plan necessary to its consummation assigned to such other in the agreement aforesaid, such third person, not knowing that such person is advised of the impending offense, and at the finality causes one of its employés to, tacitly at least, consent to the taking of the goods, not knowing of the real nature of the transaction, is such third person guilty of the crime of larceny, or does the conduct of such person take from the transaction the element of trespass or nonconsent essential to such crime?

It will be noted that the plan for depriving the packing company of its property originated with the accused, but that it was wholly impracticable of accomplishment without the property being placed on the loading platform and the accused not being interfered with when he attempted to take it. When Dolan agreed to procure such placing, the packing company in legal effect agreed thereto. Dolan did not expressly consent, nor did the agreement he had with the packing company authorize him to do so, to the misappropriation²⁵¹ of the property. Did the agreement in legal effect with the accused to place the property of the packing company on the loading platform, where it could be appropriated by the accused, if he was so disposed, and was not interfered with in so doing, though his movements in that regard were known to the packing company, and his taking of the property, his efforts to that end being facilitated as suggested, constitute consent to such appropriation?

The case is very near the border line, if not across it, between consent and nonconsent to the taking of the property. In *Regina v. Lawrance*, 4 Cox C. C. 438, it was held that if the property was delivered by a servant to the defendant by the master's direction, the offense cannot be larceny, regardless of the purpose of the defendant. In this case the property was not only placed on the loading platform, as was usual in delivering such goods to customers, with knowledge that the accused would soon arrive, having a formed design to take it, but the packing company's employé in charge of the platform, Ernst Klotz, was instructed that the property was placed there for a man who would call for it. Klotz, from such statement, had every reason to infer, when the accused arrived and claimed the right to take the property, that he was the one referred to, and that it was proper to make delivery to him and he acted accordingly. While he did not physically place the property, or assist in doing so, in the wagon, his standing by, witnessing such placing by the accused, and then assisting him in arranging the wagon, as the evidence shows he did, and taking the order, in the usual way, from the accused as to the disposition of the fourth barrel, and his conduct in respect thereto, amounted, practically, to a delivery of the three barrels to the accused.

In *Rex v. Egginton*, 2 Bos. & P. 508, we have a very instructive case on the subject under discussion here. A servant informed his master that he had been solicited to aid in

robbing the latter's house. By the master's direction the ²⁵² servant opened the house, gave the would-be thieves access thereto, and took them to the place where the intended subject of the larceny had been laid in order that they might take it. All this was done with a view to the apprehension of the guilty parties after the accomplishment of their purpose. The servant by direction of the master not only gave access to the house, but afforded the would-be thieves every facility for taking the property, and yet the court held that the crime of larceny was complete, because there was no direction to the servant to deliver the property to the intruders or consent to their taking it. They were left free to commit the larceny, as they had purposed doing, and the way was made easy for them to do so, but they were neither induced to commit the crime, nor was any act essential to the offense done by anyone but themselves.

In harmony with the case last discussed, in *Williams v. State*, 55 Ga. 391, cited by counsel for the plaintiff in error, it was held that the owner of property may make everything ready and easy for a larceny thereof by one purposing to steal the same, and then remain passive, allowing the would-be criminal to perpetrate the offense of larceny as to every essential part of such offense, without sacrificing the element of trespass or nonconsent; but, if one ostensibly acting as an accomplice, but really for the owner of the property, for the purpose of entrapping the would-be criminal, does acts amounting to the constituents of the crime of larceny, although the accused concurred in and supposed he prompted the act, he is not guilty of larceny. The circumstances of that case were these: The would-be criminal when he took the property, supposed he was committing the offense of larceny and that his associate was criminally participating therein, but because, as a fact, such person was acting by direction of the owner, and actually placed the property in the hands of the taker, the element of nonconsent essential to larceny did not characterize the transaction. A distinction ²⁵³ was drawn between one person inducing another to commit the crime of larceny of the former's goods or such person aiding in the commission of the offense, so far as the mental attitude of such other is concerned, by doing some act essential to such an offense, and merely setting a trap to catch a would-be criminal by affording him the freest opportunity to commit the offense. The latter does not sacrifice the element of non-

consent: *State v. Jensen*, 22 Kan. 498; *Varner v. State*, 72 Ga. 745; *State v. Duncan*, 8 Rob. (La.) 562; *Regina v. Williams*, 1 Car. & K. 195; *Rex v. Egginton*, 2 Bos. & P. 508.

In the case before us, the owner of the property through its agent, Dolan, did not suggest the plan for committing the offense of larceny, which was finally adopted, but the evidence shows, conclusively, that by the consent or direction of the packing company, through words or otherwise, he suggested the commission of such offense and invited from the accused plans to that end. The fair construction of the evidence is that in the finality the plan was a joint creation of the two and that it required each to be an active participant in its consummation. It seems that there is good reason for holding that the situation in that respect falls within the condemnatory language in the opinion of the court in *Love v. People*, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139, cited to our attention by counsel for the plaintiff in error. That will be apparent from the closing words of the opinion, which are as follows: "A contemplated crime may never be developed into a consummated act. To simulate unlawful intentions for the purpose and with the motive of bringing them to maturity so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate ²⁵⁴ the offense, and each and every part of it, for himself, but they must not aid, encourage, or solicit him that they may seek to punish."

We cannot well escape the conclusion that this case falls under the condemnation of the rule that where the owner of property by himself or his agent, actually or constructively, aids in the commission of the offense, as intended by the wrongdoer, by performing or rendering unnecessary some act in the transaction essential to the offense, the would-be criminal is not guilty of all the elements of the offense. Here Mr. Layer, acting for the owner of the property, packed or superintended the packing of the four barrels of meat as suggested by the owner's agent in the matter, Dolan, and caused the same to be placed on the platform, knowing that the ac-

cused would soon arrive to take them, under an arrangement between him and his agent, and directed its platform boss, when he inquired as to the purpose of so placing the barrels, "Let them go away; they are for some man, and he will call for them." He, from the standpoint of such employé, directed the latter to deliver the barrels to the man when he called, the same in all respects as done in *Williams v. State*, 55 Ga. 391. He substantially made such delivery, by treating the accused when he arrived upon the scene as having a right to take the property. In that the design to trap a criminal went a little too far, at least, in that it included the doing of an act in effect preventing the taking of the property from being characterized by an element of trespass.

The logical basis for the doctrine above discussed is that there can be no larceny without a trespass. So if one procures his property to be taken by another intending to commit larceny, or delivers his property to such other, the latter purposing to commit such crime, the element of trespass is wanting, and the crime not fully consummated, however plain may be the guilty purpose of the one possessing himself of such property. That does not militate against a person's being free to set a trap to catch one whom he suspects of an intention ²⁵⁵ to commit the crime of larceny, but the setting of such trap must not go further than to afford the would-be thief the amplest opportunity to carry out his purpose, formed without such inducement on the part of the owner of the property, as to put him in the position of having consented to the taking. If I induce one to come and take my property and then place it before him to be taken, and he takes it with criminal intent, or if knowing that one intends to take my property I deliver it to him, and he takes it with such intent, the essential element of trespass involving nonconsent requisite to a completed offense of larceny does not characterize the transaction, regardless of the fact that the moral turpitude involved is no less than it would be if such essential were present. Some writers in treating this subject give so much attention to condemning the deception practiced to facilitate and encourage the commission of a crime by one supposed to have such a purpose in view, that the condemnation is liable to be viewed as if the deception were sufficient to excuse the would-be criminal, or to preclude his being prosecuted; that there is a question of good morals involved as to both parties to the transaction, and that the wrongful

participation of the owner of the property renders him and the public incapable of being heard to charge the person he has entrapped with the offense of larceny. That is wrong. It is the removal from the completed transaction, which from the mental attitude of the would-be criminal may have all the ingredients of larceny, from the standpoint of the owner of the property, of the element of trespass or nonconsent. When such element does not characterize a transaction involving the full offense of larceny so far as concerns the mental purpose of such would-be criminal is concerned, is often not free from difficulty, the courts of review should incline quite strongly to support the decision of the trial judge in respect to the matter and not disturb it except in a clear case. It seems that there is such a case before us.

If the accused had merely disclosed to Dolan, his ostensible ²⁵⁶ accomplice, a purpose to improve the opportunity when one should present itself to steal barrels of meat from the packing company's loading platform, and that had been communicated by Dolan to the company and it had merely furnished the accused the opportunity he was looking for to carry out such purpose, and he had improved it, the situation would be quite different. The mere fact that the plan for obtaining the property was that of the accused, under the circumstances of this case, is not controlling. Dolan, as an emissary of the packing company, as we have seen, was sent to the accused to arrange, if the latter were so disposed, some sort of a plan for taking some of the company's property with the intention of stealing it. Though the accused proposed the plan, Dolan agreed to it, which involved a promise to assist in carrying it out ostensibly as an accomplice, but actually as an instrument of the packing company. That came very near, if it did not involve, solicitation by the company, in a secret way, for the accused to take its property as proposed. With the other element added of placing such property on the loading platform for the accused to take pursuant to the agreement, with directions, in effect, to the person in charge of the platform to let the accused take it when he came for that purpose, we are unable to see any element of trespass in the taking which followed. The packing company went very significantly further than the owner of the property did in *Rex v. Eggington*, 12 Bos. & P. 508, which is regarded as quite an extreme case. It solicited the opportunity to be an ostensible accomplice in committing the offense of larceny

instead of being solicited in that regard, and the property was in practical effect delivered to the would-be thief instead of its being merely placed where he could readily trespass upon the rights of the packing company by taking it. When one keeps in mind the plain distinction between merely furnishing opportunity for the execution of a formed design to commit larceny and negotiations for the purpose of developing ²⁵⁷ a scheme to commit the offense, regardless of who finally proposes the plan jointly adopted, and not facilitating the execution of the plan by placing the property pursuant to the arrangement where it can readily be taken, but in practical effect, at least, delivering the same into the possession of the would-be thief, one can readily see that the element of trespass, involving consent, is present in the first situation mentioned and not in the last, and that the latter pretty clearly fits the circumstances of this case.

By the Court. The judgment is reversed, and the cause remanded for a new trial.

The Consent of the Owner of Property to the larceny or burglary thereof as a defense to the thief or burglar is discussed in the notes to *People v. Miller*, 88 Am. St. Rep. 597; *State v. Hull*, 72 Am. St. Rep. 700; and in the subsequent cases of *State v. Currie*, 13 N. Dak. 655, 112 Am. St. Rep. 687; *Lowe v. State*, 44 Fla. 449, 103 Am. St. Rep. 171; *State v. Abley*, 109 Iowa, 61, 77 Am. St. Rep. 520.

The Admissibility of Evidence of Other Crimes in criminal prosecutions is the subject of a note to *Sykes v. State*, 105 Am. St. Rep. 976.

MASH v. BLOOM.

[130 Wis. 366, 110 N. W. 203, 268.]

CONDITIONS SUBSEQUENT—Remedy for Breach—Possession of Grantor.—When courts of equity grant relief upon the principle of *quia timet*, thus preventing any vexatious or wrongful use of agreements which by construction are declared in fact conditions subsequent, and removing them as a cloud upon title, it is immaterial whether the plaintiff is in possession of the premises. (p. 1032.)

CONDITION SUBSEQUENT—Aid of Equity to Effect Forfeiture.—Where a grantee defaults in a condition subsequent of the conveyance, the grantor's claim to the right of possession and the grantee's denial of it operate as a re-entry, and vest title in the grantor, so that when the jurisdiction of equity is invoked the rule that equity does not lend its jurisdiction to effect a forfeiture is not violated. (p. 1033.)

CONDITION SUBSEQUENT—Remedy for Breach.—In case of a breach by the grantee of a condition subsequent for the support of the grantor, which condition is expressed in the deed, and therefore can be established without a resort to evidence aliunde, the grantor cannot invoke the aid of a court of equity to enforce her rights, for she can obtain full relief in an action of ejectment wherein she can obtain a judgment declaring the conveyance forfeited, and awarding her possession. (p. 1033.)

Tenney, Hall & Tenney, for the appellant.

Frank E. Parkinson, for the respondent.

³⁰⁶ SIEBECKER, J. An action in equity. For breach of condition subsequent plaintiff seeks enforcement of her rights under a deed given by her to the defendant, and asks to have it canceled and removed as a cloud on the title. The complaint alleges that on ³⁰⁷ November 23, 1903, plaintiff was the owner of the real estate in question, and that on this day she conveyed these premises by deed to the defendant George F. Bloom in consideration of one dollar, natural love and affection, and such special consideration as is expressed in the following clause inserted in the deed:

“The special considerations and conditions upon which this deed is executed, made, and delivered are: That the said George F. Bloom and his wife, during the remainder of my natural life, shall live in the house on the premises above conveyed and shall be good and kind to the said Rebecca M. Mash and shall help take care of her and nurse her and administer to her natural wants, as good, loving, affectionate and kind children would do for a parent.

“These ‘special considerations and conditions’ shall subsist and inure for my benefit while I, the said Rebecca M. Mash, shall continue in life. And with my death the same shall cease and be as if they were not written in this deed. They are here written solely and exclusively for my sole, personal benefit and to secure the good faith and conduct herein of said George F. Bloom and wife while I shall live and for the use and benefit of no other person or persons whatsoever.”

The property is situated in the city of Madison and has a value of from three thousand five hundred to four thousand dollars. It is alleged that the plaintiff, the grantor in this deed, is seventy-two years of age, and is a widow without any children or other relatives to care for her in her declining years. The defendant's wife, Sarah Bloom, is a niece of plain-

tiff's deceased husband. In his lifetime he entertained a very kindly feeling toward his niece and loved her much, and the plaintiff, prior to the making of this deed, respected her and entertained full confidence in her as a friend and as a trustworthy and highly respected person. Plaintiff also at that time entertained a high regard for, and friendly feelings toward, George F. Bloom, and believed him to be a man of honesty and integrity. Plaintiff resides in her house, situated on the lot, a portion of which she conveyed ³⁶⁸ to defendant. She delivered the deed to the defendant, and immediately thereafter defendant and his wife moved into the house, which is situated on the part of the lot so conveyed. It is alleged that this deed was made, executed and delivered pursuant to a parol agreement of the parties to this action to the effect that they were to care for and nurse plaintiff; that such care and nursing was to include personal attention by them to plaintiff's household duties, preparing and serving her food, and doing all things necessary in attending to the fires in her house, her laundry, her yard, the sidewalk, and the care of her building on the premises; that they were to be kind and agreeable companions, and were to wait upon and nurse her when sick and infirm. It is further alleged that from and after March 17, 1904, defendant has wholly failed to perform these obligations so undertaken by him; that he now continues to disregard these obligations; and that this action is brought to have the deed canceled for this breach of the conditions of the deed, and to have it canceled and removed as a cloud upon the title to her property, and to debar defendant from claiming any right under it.

The defendant denies having breached this agreement as charged by plaintiff, and avers that no agreements were made as a condition of such conveyance except as written and expressed in this deed, and that the conditions expressed in the deed have in all respects been fully performed and carried out, except in so far as plaintiff by her wrongful conduct has prevented this being done, and has made it impossible to perform the conditions so assumed. Defendant interposed a demurrer to the complaint and alleged that plaintiff had a complete remedy at law. This was overruled. Defendant answered, and before trial asked an amendment, which was allowed, alleging that plaintiff had a full and adequate remedy at law. This action was tried before the court upon its merits. The court, upon the findings of fact, awarded judgment ³⁶⁹ in

plaintiff's favor, upon the ground that defendant had failed to comply with the conditions of the agreement between the parties. The judgment canceled the deed, declared it a cloud upon plaintiff's title to the property, and restored to her as owner in fee all rights in the property. This is an appeal from the judgment.

The controlling question of law presented by appellant is the right of respondent, upon the facts and circumstances on which she relies for relief, to invoke the jurisdiction of equity for the determination of her rights. Her claim that this court has repeatedly granted equitable relief upon like grounds is challenged by appellant, and we are cited to the decisions of this court to justify such contentions. Appellant asserts that these decisions show that, whenever equitable relief has been awarded in this class of cases, it was upon the ground that the parties had no full and adequate remedy at law to enforce their rights, and that the facts of this case do not present such a case, for the reason that plaintiff can, by action in ejectment, fully, adequately, and expeditiously enforce and protect her rights. An examination of the cases cited and relied upon by the parties in support of their respective contentions convinces us that equitable relief has been granted in cases only where the facts and circumstances shown demanded some form of relief not within the power of a court of law but which could be reached by some equitable remedy. *Delong v. Delong*, 56 Wis. 514, 14 N. W. 591, a case in substance like the one before us, is the only case that has come to our attention which can serve as a precedent, and this was an action in ejectment. True, all these cases dealt with defaults concerning agreements by parties who had obligated themselves to pay some sum of money ^{\$70} in small amounts at stated periods for the support of some person, to render some personal service to them, or, in some form, in consideration of the transfer of real or personal property by them, to make provision for their necessities in life. But in all except the *Delong* case (56 Wis. 514, 14 N. W. 591) the contract for such payment, support, and maintenance was embodied in a separate instrument from the deed of conveyance or rested in parol, thus leaving the deed of conveyance of such property in the form of an absolute conveyance. To restore the parties to such a transaction to their right in the property conveyed in consideration of such support and maintenance required the employment of the power of a court of

equity, which brought the parties before the court and ascertained what obligations as a condition of the deed had been entered into for the benefit of the grantors. In the syllabus of *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458, in which case these questions were fully considered, the rule is stated as follows: "To the end that the conditional grantor's remedy may be complete, [equity] will cancel all writings and records that might otherwise be used, presently or in the future, to his prejudice, acting, not upon the theory that they are avoided by the court, but that they are void independent thereof, and that equity jurisdiction is required to settle the status of the property in accordance with the facts, on the principle of *quia timet*, and to clear away those things which, though void in fact, might, by reason of their apparent force, be used by the holders thereof in some way, presently or in the future, wrongfully."

Other cases in this court, which were brought and determined within the jurisdiction of equity, are the following: *Bogie v. Bogie*, 41 Wis. 209; *Bresnahan v. Bresnahan*, 46 Wis. 385, 1 N. W. 39; *Morgan v. Loomis*, 78 Wis. 594, 48 N. W. 109; *Hartstein v. Hartstein*, 74 Wis. 1, 41 N. W. 721; *Beckman v. Beckman*, 86 Wis. 655, 57 N. W. 1117; *Wanner v. Wanner*, 115 Wis. 196, 91 N. W. 671.

Counsel for both parties devote much consideration to the ³⁷¹ question whether or not plaintiff is precluded from suing in equity because she is not in the actual possession of the premises. In view of the importance attached to this subject, we deem it proper to advert to it, and to state that in the foregoing cases the court of equity granted relief upon the principle of *quia timet*, thus preventing any vexatious or wrongful use of agreements which by construction were declared to be in fact conditions subsequent, and removing them as a cloud upon the title. Since these are the grounds upon which equity is set in motion, it is immaterial whether or not the plaintiff in such a case is in possession of the premises. In the following cases it was expressly held that the fact that plaintiff was not in possession could not affect the right to maintain such an action, for the reason that the legal remedy in restoring possession in such cases is inadequate, in that it leaves some void instrument or muniment of title outstanding and uncanceled. The distinguishing feature of this class of cases consists in the fact that the invalidity of the hostile cloud sought to be removed cannot be established except by a resort

to evidence aliunde the record: *Pier v. Fond du Lac*, 38 Wis. 470; *Goodell v. Blumer*, 41 Wis. 436; *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465; *Smith v. Zimmerman*, 85 Wis. 542, 55 N. W. 956; *Davenport v. Stephens*, 95 Wis. 456, 70 N. W. 661; *Kruczinski v. Neuendorf*, 99 Wis. 264, 74 N. W. 974; *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585. In view of her theory and position before the court, the suggestion that plaintiff is attempting to enforce a forfeiture is not strictly correct. She asserts that defendant defaulted in the conditions of the conveyance, and that her claim to the right of possession and defendant's denial of it operates as a re-entry and vests the title in her. Whenever parties can properly invoke the jurisdiction of equity, "in such a case the court does not lend its jurisdiction to effect a forfeiture. The rule in that regard is not violated. The forfeiture, or rescission as it is sometimes called, is ³⁷² effected by the acts of the grantor, by his re-entry, or its equivalent, for condition broken": *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458; Stats. 1898, sec. 3079; *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833.

The question remains: Does plaintiff's case support her contention that she requires the aid of equity to have this property restored to her with a clear title? She alleges that the condition of the deed was broken, and she is for that reason entitled to have the actual possession restored to her. The complaint alleges a state of facts which shows that she seeks to recover the possession of real estate, the title to which has reverted to her by reason of a breach of a condition subsequent. To enforce this right it is necessary to establish the breach of condition alleged. Proof of such breach would entitle her to judgment declaring the conveyance had been forfeited and an award to her of the possession of the property. This procedure would enforce all her rights and accomplish the complete restoration of her rights as before the conveyance, and result in canceling the deed as of no further effect and therefore void. This would be a full, complete and adequate remedy, enforceable in an action in ejectment. Under such circumstances the parties are left to enforce their rights in such an action at law. This was the course pursued in *DeLong v. DeLong*, 56 Wis. 514, 14 N. W. 591, which was a similar case, in that the grounds of relief were for breach of a condition in a deed providing for the support of the grantor. It has been repeatedly ruled from an early period

that, if parties can enforce their rights to recover the possession of real property in an action in ejectment, equity will not aid them: *Clark v. Drake*, 3 Pinn. 228; *Mills v. Evansville Sem.*, 47 Wis. 354, 2 N. W. 550; *Lawe v. Hyde*, 39 Wis. 345; 1 *Pomeroy's Equity Jurisprudence*, 3d ed., sec. 459, and cases cited; *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157.

We are persuaded that the court erred in not holding, as ³⁷³ asserted by defendant at the first opportunity, that plaintiff has a complete and adequate remedy at law. This necessarily calls for a reversal of the judgment and the dismissal of the action. It is therefore unnecessary to consider whether the evidence and findings support the judgment.

By the Court. The judgment appealed from is reversed, and the cause remanded to the circuit court with directions to award judgment of dismissal of the action.

The following opinion was filed January 23, 1907:

MARSHALL, J., Concurring. I will state a few propositions, unaccompanied by discussion, which it seems govern this case.

1. Where the holder of the legal title to land is out of possession, and another adversely withholds the same under claim of title, the former need not, necessarily, sue in equity to vindicate his right because the invalidity of the latter's claim must be established by evidence aliunde the record.

2. In the situation stated, there being no circumstance making the case classible under a recognized head of equity jurisprudence, the true owner cannot properly sue in equity to avoid his adversary's claim and regain possession.

3. In such situation the mere fact that the hostile claim appears of record and as a cloud on the true title does not entitle the true owner to use equity jurisdiction to regain possession, since an action at law will remedy the wrong and incidentally remove the cloud, but the case is otherwise where the hostile title is founded on fraud which must be established by evidence aliunde the record. It is fraud or some other efficient circumstance which justifies the use of the equitable remedy: *Burrows v. Rutledge*, 76 Wis. 22, 44 N. W. 847..

4. In such situation if the holder of the legal title is such by forfeiture of his adversary's title for breach of condition ³⁷⁴ subsequent, which breach, but not the condition, must be established by evidence aliunde the record, no question of

fraud or other efficient question, such as mistake, being involved, such holder may sue at law to regain possession of the property.

5. In the situation last above indicated, except that the condition subsequent is not contained in the deed or any instrument forming a part of an entire transaction including the deed, but which must be established by implication from the circumstances, as in case where a person makes a conveyance in the ordinary form, the real consideration, however, being personal attention and support of the grantor by the grantee, the person who shall have regained title by breach of condition subsequent must sue to regain the property, in equity, but solely on the ground that the condition itself is a discovery, so to speak, only competent to be made and declared by that jurisdiction.

6. The distinction between *Delong v. Delong*, 56 Wis. 514, 14 N. W. 591, and similar cases, and *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458, and similar cases, is that in the former the condition subsequent was declared by the parties in writing as a part of the transaction which included the making of the deed, while in the latter the condition was declared by the court as an implication from the circumstances which equity jurisdiction, by a rule of construction, so to speak, peculiar to itself, could determine was the intention of the parties.

This case belongs to the first class, hence the action in equity was improperly brought. To sustain it would violate the constitutional guaranty of the right of trial by jury.

WINSLOW, J. I concur in the views expressed by Mr. Justice Marshall.

Courts of Equity Frequently Assume Jurisdiction when necessary to the protection of a grantor who has conveyed his property on the condition that the grantee shall support him during the remainder of his life, but fails to perform the condition: See the note to *Trustees of Union College v. New York*, 93 Am. St. Rep. 578.

ARP v. ALLIS-CHALMERS COMPANY.

[130 Wis. 454, 110 N. W. 586.]

LIMITATION OF ACTIONS—Conflict of Laws.—A statute which provides that no action for personal injuries shall be maintained unless within one year a written notice containing certain prescribed statements shall be served on the person responsible for the injury, is a limitation statute admitting of no exception. It applies to both foreign and domestic causes of action, and acts like any statute of limitations, extinguishing the right in a domestic cause of action as to all jurisdictions, and extinguishing the right in a foreign cause of action sought to be enforced in this state by a nonresident, so far as its enforcement in our courts is concerned. (p. 1037.)

Robert N. McMynn, C. H. Van Alstine and Darrow, Master & Wilson, for the appellant.

Vilas, Vilas & Freeman, for the respondent.

455 WINSLOW, J. This action was commenced August 10, 1904, and was brought by the plaintiff to recover damages for personal injuries suffered by the plaintiff while in the employ of the defendant, as the result of an accident which happened at the defendant's shop in the city of Chicago, March 31, 1903. The defendant is a foreign corporation operating a manufacturing plant in Wisconsin, and on the 17th of September, 1901, had duly filed with the Secretary of State an instrument appointing a resident attorney in this state as required by section 4231, Statutes of 1898. The defendant by answer pleaded as a defense that part of subdivision 5, section 4222, Statutes of 1898, which provides that no action to recover damages for personal injuries shall be maintained unless a written notice thereof containing certain prescribed statements shall be served on the person responsible for the injury within one year after the happening of the event. It was admitted on trial that no notice as required by said subdivision had been served. A verdict for the defendant was directed, and from judgment thereon the plaintiff appeals.

The controlling question presented is whether that part of section 4222 above referred to applies to a cause of action arising in another state when a resident of that state brings suit thereon against a resident of Wisconsin in a Wisconsin court. A few well-established principles seem to answer this question in the affirmative. The clause in question is a statute of limitations: *Relyea v. Tomahawk P. & P. Co.*, 102 Wis.

301, 72 Am. St. Rep. 878, 78 N. W. 412; *O'Donnell v. New London*, 113 Wis. 292, 89 N. W. 511; *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033; *Lawton v. Waite*, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616; *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 1, 81 N. W. 1003, 49 L. R. A. 475. True, its operation is somewhat different from the operation of other statutes of limitation, in that it acts upon the time within which a preliminary ⁴⁵⁶ notice shall be served instead of the time within which the summons shall be served, but it is none the less a limitation upon the right to maintain the action: *Troschansky v. Milwaukee E. R. & L. Co.*, 110 Wis. 570, 86 N. W. 156. It is the long-settled doctrine of this court that, when a statute of limitations has completely operated, it extinguishes the right of action by taking away the remedy: *Eingartner v. Illinois S. Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433. In the absence of any saving clause our statutes of limitation operate against nonresident plaintiffs who bring actions in the courts of this state as well as against residents: *Winter v. Winter*, 101 Wis. 494, 77 N. W. 883; *Fields v. Estate of Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39, 82 N. W. 343. Were the rule otherwise the result would be that nonresident litigants coming into our courts to enforce a foreign cause of action would possess greater rights and privileges than citizens of our own state. They are entitled to the same right and privileges—no more, no less: *Eingartner v. Illinois S. Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, 68 N. W. 664, 34 L. R. A. 503. This does not mean that our statutes of limitation have any extraterritorial effect so far as foreign causes of action are concerned. They do not reach over into Illinois and extinguish a right of action arising there. It only means that the foreign right sought to be enforced in this state after our statute has run has ceased to exist, so far as regards its enforcement in this state, although the right and all remedies to enforce it in the state of Illinois remain entirely unaffected. Of course, when a cause of action arising here between residents of Wisconsin is barred here, the right is extinguished in all jurisdictions, but no one could reasonably claim that because it could not be enforced under the limitation laws of a sister state it is barred here.

So we hold that the provision in question is a limitation statute admitting of no exception; that it applies to both foreign and domestic causes of action; that it acts like any other statute of limitations, extinguishing the right in a domestic

cause of action as to all jurisdictions, and extinguishing the ⁴⁵⁷ right in a foreign cause of action sought to be enforced in this state by a nonresident, as far as its enforcement in our courts is concerned. This accords with the decision of the trial court.

By the Court. Judgment affirmed.

Timlin, J., took no part.

If the Statute of Limitations is regarded as going to the remedy merely without affecting the right, then the statute of the forum must ordinarily govern. Hence an action, though not barred where it arose, may be barred by the law where it is sought to be enforced; and, on the other hand, though barred by the law of the state where it arose, may not be barred by the law of the forum: See the notes to *Menzell v. Hinton*, 95 Am. St. Rep. 660; *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 878. Consult, also, *Hunter v. Niagara Fire Ins. Co.*, 73 Ohio St. 110, 112 Am. St. Rep. 699; *Negau-bauer v. Great Northern Ry. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674.

McKEIGUE v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[130 Wis. 543, 110 N. W. 384.]

ADMINISTRATORS—Title to Personal Property.—An executor or administrator is invested with the legal title to the personal property of the estate, but he holds that title charged with the duty of managing and disposing of the same in accordance with the provisions of the will or of the law. (p. 1040.)

ADMINISTRATORS—Relation of Trustee.—The duties of an executor or administrator are trust duties. In all essential respects he is regarded in courts of equity as a trustee. (p. 1040.)

TRUST PROPERTY—Right of Beneficiaries to Deal with.—Beneficiaries of trust property who are sui juris and whose rights are vested may deal with and convey their equitable interests in the trust property, and the trustee will be required to convey the legal title in accordance therewith if such action is not contrary to the terms of the trust. (p. 1040.)

ADMINISTRATORS—Heirs and Creditors as Beneficiaries.—In the administration of an intestate estate the beneficiaries of the trust are the creditors and the heirs. When the creditors are all paid, the heirs are the sole beneficiaries. (p. 1040.)

ADMINISTRATORS—Settlement by Heir for Wrongful Death of Intestate.—A settlement made by a corporation with the sole heir of a person killed while in its employ is binding upon the administrator subsequently appointed, where the asset involved in the settlement is not needed for the payment of creditors or the expenses of administration, and if recovered by the administrator will go to the heir. (p. 1041.)

Edward H. Ryan and O. A. Oestreich, for the appellee.

Edward M. Hyzer, for the respondent.

⁵⁴⁴ WINSLOW, J. This is an action brought by the administrator of the estate of one Broderick, deceased, to recover damages received by said Broderick while in defendant's employ, and alleged to have been caused by defendant's negligence. It appears by the complaint that Broderick died about four hours after receiving his injuries, and as the result thereof. ⁵⁴⁵ The defendant by answer denied all allegations of negligence, and alleged by way of equitable defense that Broderick died intestate, leaving no widow, descendants, or ancestors surviving, and but one heir at law, to wit, his sister, Johanna Murphy, who made claim against the defendant for damages on account of Broderick's injuries; that the defendant denied liability for such injuries, and that it compromised and settled said claim with said Johanna Murphy by paying her the sum of one thousand dollars, and receiving from her a full release and discharge of all claims resulting from the injury and death of Broderick; that the time for presentation of claims against the estate of Broderick has fully expired, and that but one claim of two hundred and thirty-two dollars has been presented; that the personal and real estate left by said Broderick amount to twelve hundred dollars; and that the injuries sought to be recovered for in this action are the same injuries for which said settlement was made. A general demurrer to this equitable defense was overruled, and the plaintiff appeals.

The question presented by the demurrer is that which was suggested but not decided in the case of *Chicago etc. R. Co. v. McKeigue*, 126 Wis. 574, 105 N. W. 1030, where an independent action in equity was brought to enjoin the prosecution of the present action at law, and held not to be maintainable because the facts alleged could be set up as an equitable defense in this action. The question is thus fairly stated by the respondent: "Is the settlement made by the defendant with Johanna Murphy, sole surviving heir at law of Broderick, deceased, prior to administration, binding upon the administrator subsequently appointed, when the asset involved in the settlement is not needed by the administrator for creditors or expenses ⁵⁴⁶ of administration, and when the asset involved in the settlement, if recovered by the administrator, will go to said Johanna Murphy?"

We think this question must be answered in the affirmative. An executor or administrator is invested with the legal title to the personal property of the estate, but he holds that title charged with the duty of managing and disposing of the same in accordance with the provisions of the will or of the law. His duties are trust duties. In all essential respects he is regarded in courts of equity as a trustee: 2 Woerner's Law of Administration, 2d ed., secs. 383, 500. In the broad sense of the word, a trustee is one "in whom some estate, interest, or power in or affecting property is vested for the benefit of another": Hill on Trustees, 41. In this sense the term includes executors, administrators, guardians, receivers, trustees in bankruptcy, factors, bailees, and agents, and all persons vested with the title or control of property and charged with fiduciary duties in relation thereto for the benefit of another: Hill on Trustees, 41; 1 Lewin on Trusts, 1st Am. ed., 490. This is familiar law. Executors, administrators and guardians are frequently called trustees and held to the responsibilities and duties of trustees by the courts: *Gillett v. Gillett*, 9 Wis. 194; *Hutson v. Jenson*, 110 Wis. 26, 75 N. W. 689; *Abrams v. United S. F. & G. Co.*, 127 Wis. 579, 115 Am. St. Rep. 1055, 106 N. W. 1091, 5 L. R. A., N. S., 575; *Taylor v. Hill*, 86 Wis. 99, 56 N. W. 738; *In re Thurston*, 57 Wis. 104, 15 N. W. 126; *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90. It is well settled that beneficiaries of trust property, who are sui juris and whose rights are vested, may deal with and convey their equitable interests in the trust property, and the trustee will be required to convey the legal estate in accordance therewith if such action be not contrary to the terms of the trust: 2 Lewin on Trusts, 1st Am. ed., 684, 692. In case of an administrator the beneficiaries of the trust are the creditors of the estate and the heirs at law of the intestate. When all creditors have been paid, the heirs at law are the sole beneficiaries. ⁵⁴⁷ In the present case, the answer alleges the possession by the administrator of property far in excess of the claims allowed, and further, that the time for the presentation of claims has expired. If, therefore, the administrator be allowed to prosecute his claim to judgment, he will do so (under the allegations of the answer) solely in order that he may pay the net proceeds to the sole beneficiary who made a settlement of the claim with the defendant before the appointment of the administrator. If this settlement was freely

and fairly made, must a court allow the claim to be prosecuted again for the sole benefit of the person who made it, and who received and retains the full amount paid in settlement? The statement of the proposition seems its best answer. Such a rule would shock every natural sense of justice. Courts exist to redress or prevent wrongs, not to perpetrate them. Doubtless injustice is often inflicted by the decision of courts, but this results from defects in legal machinery, the inability of mere human lawmakers to grasp and comprehend the effect of legislation, or from the necessary imperfection of finite judgment and reasoning, rather than from any conscious or intentional departure from the dictates of justice and right. Happily, there are no arbitrary legal rules which prevent the court from administering justice in a case such as is claimed by the answer to exist. This court has already held that the sole beneficiary of a claim for the death of one person by the act or default of another under sections 4255, 4256, Statutes of 1898 (Lord Campbell's Act), has power to make a valid and binding settlement with the wrongdoer, notwithstanding the fact that any action for such damages must be brought by the personal representative of the deceased: *Schmidt v. Deegan*, 69 Wis. 300, 34 N. W. 83.

While the present action is brought to recover damages for the sufferings of the deceased, and belongs technically to the estate, the essential relations of the beneficiary to the claim for damages where no creditors are interested are the same as ⁵⁴⁸ in the *Deegan* case (69 Wis. 300, 34 N. W. 83). In both cases any recovery is for the sole benefit of the person making the settlement who is *sui juris*. If she could make a valid settlement, then, of course, such settlement, at least in equity, becomes a bar to the prosecution of any action for her benefit by the personal representative. The precise question here presented was answered in the affirmative by the supreme court of Minnesota in *Vail v. Anderson*, 61 Minn. 552, 64 N. W. 47. The same general rule has been applied in other jurisdictions: *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90; *Johnson's Admr. v. Longmire*, 39 Ala. 143; *Walworth v. Abel*, 52 Pa. 370; *Woodhouse v. Phelps*, 51 Conn. 521. See, also, 22 Cyc. 222, 223. Should issue be taken on the answer and it should appear on the trial that, although the alleged settlement was made, still there are creditors or other beneficiaries who are interested

in the recovery, their rights will not, of course, be affected by the settlement made with Johanna Murphy.

By the Court. Order affirmed.

The Bar or Abatement of an Action for wrongful death by a settlement made by an heir or by the personal representative of the deceased is discussed in the note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 683.

STATE v. JONES.

[130 Wis. 572, 110 N. W. 431.]

OFFICES—When Incompatible.—It is not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties, then the offices are incompatible. (pp. 1043, 1044.)

OFFICES—When Incompatible.—The Offices of County Judge and justice of the peace are incompatible, so that a county judge loses his right of office by qualifying as a justice of the peace and entering upon his duties as such. (p. 1044.)

Greene, Fairchild, North & Parker, for the appellant.

L. M. Sturdevant, attorney general, A. C. Titus, assistant attorney general, and McGee & Jeger, for the respondent.

⁵⁷³ TIMLIN, J. This action was begun October 12, 1905, and was tried upon an agreed statement of facts establishing that on April 2, 1901, the appellant was elected county judge of Oconto county, qualified, and entered upon the discharge of the duties of that office January 6, 1902. While holding said office, and on April 4, 1905, he was elected to the office of justice of the peace in the city of Oconto in said county, and accepted the latter office and entered upon the discharge of its ⁵⁷⁴ duties on May 1, 1905. Appellant was re-elected county judge on April 4, 1905, for the term beginning on the first Monday of January, 1906, and on October 18, 1905, qualified for the office last mentioned for the term last mentioned. There are six qualified and acting court commissioners in Oconto county. The term of office of the county judge is four years: Stats. 1898, sec. 2441. The learned circuit judge in his opinion filed in the case mentioned the instances of

habeas corpus in which a county judge might be called upon to review the validity of a commitment by a justice of the peace, and the statutory power of the county judge to compel the delivery of books and papers by officers to their successors which might be invoked against a justice of the peace. He rested his decision mainly on *State v. Hadley*, 7 Wis. 700, and *Milward v. Thatcher*, 2 Term Rep. 81, 7 Eng. Rul. Cas. 320, as there interpreted and applied. In *Milward v. Thatcher*, 2 Term Rep. 81, the action was brought to try the right of the plaintiff therein to have the office of town clerk to which he had been last elected and which was filled by the defendant, who claimed the right to hold for life. The jury having found against the right of the defendant to hold for life, it became unnecessary to decide whether or not the office of jurat held by the plaintiff was incompatible with the office of town clerk to which he was last elected and which he was seeking to hold, because, as stated in the decision, the question of incompatibility of duties would not affect his right to hold the office which he last accepted. But in reply to the argument of counsel that there was in the borough a sufficient number of jurats to hold court without the plaintiff, Ashhurst, J., said: "There may be cases in which it would be absolutely necessary for him to sit in that character, as in case of the sickness of the other members; and if there be one possible case in which he might be called upon to act, that is an answer to the argument."

⁵⁷⁵ In his separate opinion there is a like dictum by Buller, J.: "If the king by his charter say there shall be a mayor, twenty-four jurats, and a town clerk, the corporation cannot by their own act reduce the number by consolidating two of these offices."

In *State v. Hadley*, 7 Wis. 700, these dicta seem to have become the basis of the decision. The relator in a contest by quo warranto for the office of police justice of the city of Watertown was held to have no right to that office, because at the time he was holding the office of justice of the peace in the same city. The court said: "We consider that the two offices are clearly incompatible with each other, and that one person cannot and should not hold both of them at the same time. In the plainest terms the charter gives the city four judicial officers of the grade of justice of the peace, while, if the relator could make good his right to the office of police justice, it would in fact have but three."

This is a strong and authoritative declaration of public policy. It is said elsewhere that the incompatibility "which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both": Mechem on Public Officers, sec. 422, and cases. Preliminary examinations in criminal cases may be held before a justice of the peace, county judge, or court commissioner: Stats. 1898. c. 195. The consolidation in one person of the offices of county judge and justice of the peace diminishes the number of examining magistrates by one. There is some conflict in the instances mentioned by the learned circuit court between the duties of county judge and those of justice of the peace. It was not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office was superior to the other in some of its principal or important duties, so that the ⁵⁷⁶ exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible: *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226; *State v. Buttz*, 9 S. C. 156; *Rex v. Tizzard*, 9 Barn. & C. 418; *People v. Green*, 58 N. Y. 295; *State v. Bus*, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616. The decision in this case, is, however, based upon *State v. Hadley*, 7 Wis. 700, by which we consider ourselves bound under the rule *stare decisis*.

We do not understand that the term of the appellant which was to begin in January, 1906, is affected by the judgment appealed from.

By the Court. The judgment of the circuit court is affirmed.

The Loss of One Office by Accepting another office incompatible therewith is the subject of a note to Attorney General v. Oakman, 86 Am. St. Rep. 578.

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2. **REFORM PROCEDURE—Abolition of Distinction Between Law and Equity, Objects of.**—One of the objects of the provision of the constitution of Idaho abolishing all distinctions between actions at law and suits in equity, and giving the district courts jurisdiction both at law and in equity, was to rid our system of the multiplicity of suits and vexatious and cumbersome procedure, and to give litigants full and complete relief in a single action, where, under the old practice, several suits were necessary to accomplish that result. (Idaho) *Coleman v. Jagers*, 207.

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1. **ADOPTION—By What Nations Recognized.**—The adoption by one person of the children of another was unknown to the common law of England but it was recognized by the law of Rome and many other ancient nations. (Mo.) *Hockaday v. Lynn*, 672.

2. **ADOPTION—Strict and Liberal Construction.**—Statutes of adoption are construed strictly against the adopted child, but the act of adoption is construed liberally in his favor. (Mo.) *Hockaday v. Lynn*, 672.

3. **ADOPTION—Right of Inheritance in General.**—Consanguinity is so fundamental in statutes of succession that it can be ignored by construction only when courts are forced to do so, either by the terms of express statutes or by inexorable implication. (Mo.) *Hockaday v. Lynn*, 672.

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ont the share which such parent would have inherited had he survived his brother. (Mo.) *Hockaday v. Lynn*, 672.

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PURE FOOD LAWS—Application.—A preparation sold as “food” and labeled that, though it is not sold as a feeding stuff, that it fattens and improves stock, is subject to regulation under a pure food statute applying to all “condimental stock foods, patented and proprietary stock foods, claimed to possess nutritive properties and all other materials intended for feeding to domestic animals.” (Mich.) *Pratt Food Co. v. Bird*, 601.

ADVERSE POSSESSION.

ADVERSE POSSESSION—Parent and Child.—If a child holding a deed to a tract of land dies without having entered into possession, and thereafter her father, living on a different tract, takes possession and holds it until his death, when other of his children enter into possession, it will not be presumed that the father entered into possession in behalf of such other children, without evidence that he professed to do so, nor that they had any title, or at most only color of title, and his possession will not inure to them and perfect any colorable title they may have had as against a stranger holding a deed to the land. (N. C.) *Barrett v. Brewer*, 787.

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APPEAL AND ERROR.

1. **APPEAL**—“Person Interested.”—An Administrator de bonis non directed by the probate court to pay a sum of money to a certain person is “a person interested” in the decree of such court appointing an administrator of the estate of the person to whom

such payment is directed to be made, but whom the administrator de bonis non claims is still alive, so that such administrator is entitled to an appeal therefrom. (Vt.) *In re Clark's Estate*, 938.

2. **APPEAL**—"Person Interested."—A "person interested," within the meaning of a statute allowing an appeal from a decree of the probate court, is one who has some legal right, or is under some legal liability, that may be enlarged or diminished by the decree. (Vt.) *In re Clark's Estate*, 938.

3. **APPEAL**—Agreed Statement of Facts.—If a case is submitted on an agreed statement of facts, no point of law can be examined not arising on the facts stated, nor can the allegation of any fact, not found in such statement, receive attention. (La.) *Garner v. Freeman*, 361.

4. **APPEAL**—Amendment of Judgment.—A judgment as between coappellees alone cannot be disturbed or amended on appeal. (La.) *Garner v. Freeman*, 361.

5. **APPEAL**—Bringing Up Evidence.—A judgment will not be affirmed because the bill of exceptions fails to show affirmatively that it contains all the evidence, if it contains enough to show affirmatively that the court's finding was erroneous. (Ark.) *Wadly v. Leggitt*, 70.

6. **APPEAL AND ERROR**—Appealable Orders.—The refusal of the chancellor to grant a new trial of an issue at law as directed by him in a suit to quiet title to land is an appealable order. (N. J. Eq.) *Brady v. Carteret Realty Co.*, 778.

7. **APPEAL AND ERROR**—A defendant is not bound to except to an instruction which there is no evidence to warrant, and he has already moved to dismiss the action. (N. C.) *Barrett v. Brewer*, 787.

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ASSIGNMENT FOR CREDITORS.

1. **ASSIGNMENT FOR CREDITORS**—Rights of Creditors.—The rights of creditors of an assigned estate are fixed at the date of the assignment, and only those who are creditors of the assignor at that date are entitled to participate in the distribution of the proceeds of the estate. (Pa.) *Chestnut Street Trust etc. Company's Assigned Estate*, 909.

2. **ASSIGNMENT FOR CREDITORS**—A Creditor is one who has a definite demand against the estate, or a cause of action capable of adjustment and liquidation upon the trial. (Pa.) *Chestnut Street Trust etc. Company's Assigned Estate*, 909.

3. **ASSIGNMENT FOR CREDITORS**—Debts Collectible.—Debts due in praesenti and payable in futuro are claims against the assignor for the benefit of his creditors, for which his estate is liable in the hands of his assignee, and so, also, are damages resulting from the breach of a contract occurring prior to assignment. (Pa.) *Chestnut Street Trust etc. Company's Assigned Estate*, 909.

4. **ASSIGNMENT FOR CREDITORS**—Debts not Existing or Contingent at Date of Assignment.—Generally, any claim or demand against an assignor for the benefit of his creditors which is certain, or may be reduced to a certainty at the date of the assignment, is a debt payable out of the assigned estate, but a claim against the assignor arising after the date of the assignment will not be allowed to participate in the distribution of his estate, and the possibility of

a claim, depending upon the happening of a contingency in the future, will not constitute a demand for which the assigned estate is liable. (Pa.) Chestnut Street Trust etc. Company's Assigned Estate, 909.

5. ASSIGNMENT FOR CREDITORS—Debts Allowable.—A Conditional Bond does not create an indebtedness absolutely payable in the future, but is an obligation which becomes an indebtedness on the happening of a contingency, and until such contingency happens, there is no claim or demand which can be enforced against an assignor for the benefit of creditors, or against his estate. (Pa.) Chestnut Street Trust etc. Company's Assigned Estate, 909.

6. ASSIGNMENT FOR CREDITORS—Debts Collectible—Guardian and Ward.—If a trust company assigns for the benefit of creditors, delivering to its assignee all of its general assets, but retaining and continuing to administer its trust funds, and thereafter funds held by it as surety for a guardian are stolen by one of its officers, the ward in favor of whom no liability has yet accrued cannot participate as a general creditor in the distribution of the funds in the hands of the assignee for the benefit of creditors. (Pa.) Chestnut Street Trust etc. Company's Assigned Estate, 909.

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1. A BAILOE may Recover of His Bailee for the Latter's Conversion of the thing bailed. (Conn.) Barker v. Lewis Storage etc. Co., 141.

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BANKS AND BANKING.

1. BANKS AND BANKING—Acceptance of Check by Drawee.—A telegraphic inquiry, "Is J. F. Donald's check on you for \$350 good?" responded to by telegraph that, "J. F. Donald's check is good for the sum named," is not an absolute promise to pay, and does not constitute an unqualified acceptance of the check. (Kan.) First Nat. Bank v. Commercial Savings Bank, 340.

2. BANKS AND BANKING—Acceptance of Check by Drawee.—The drawee of a bank check cannot be held liable upon a claimed contract of acceptance external to the bill, unless the language used clearly and unequivocally imports an absolute promise to pay. (Kan.) *First Nat. Bank v. Commercial Savings Bank*, 340.

3. BANKS AND BANKING—Discount of Note—Bona Fide Holder.—If a bank discounts paper for a depositor and gives him credit upon its books for the proceeds thereof, it is not a bona fide holder for value so as to be protected against infirmities in the paper, so long as no part of the deposit is drawn or the balance of the account exceeds the proceeds of the discounted paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. (Minn.) *Union Nat. Bank v. Winsor*, 641.

4. BANKS AND BANKING—Discount of Depositor's Paper—Bona Fide Holder.—If a bank discounts a note for its depositor and gives him credit on its books for the proceeds, it becomes a bona fide purchaser of the note for value so as to protect it against infirmities in the paper, if, before it receives notice of such infirmities, it pays to the depositor or to his order an amount which reduces his deposit to a sum less than was placed to his credit, as the proceeds of the note. (Minn.) *Security Bank of Minnesota v. Petruschke*, 644.

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MARRIAGE—Proof of—Legitimacy of Child.—In the absence of all proof of marriage, and in the face of an absolute denial by defendant, the legitimacy of a child will not be presumed, where one of the parties to the suit is a party to such asserted marriage and makes no attempt to prove it. (La.) *Lynch v. Knoop*, 391.

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BIGAMY.

BIGAMY—Belief that Wife is Dead.—An honest belief, based upon reasonable grounds by a husband that his wife is dead, is no

defense to a charge of bigamy, when the second marriage is within the statutory period of seven years' continual absence of such wife out of the state or beyond the seas. (Vt.) *State v. Ackerly*, 940.

BILLS AND NOTES.

In General.

1. **BILLS AND NOTES—Negotiable Instruments—Unconditional Payment.**—An order reading, "Hutchinson, Kan., August 10, 1903. G. W. Lightner, Offerle, Kan.: Dear Sir.—Pay to the order of the First National Bank of Hutchinson, Kansas, \$1500 on account of contract between you and the Snyder Planing-mill Company. The Snyder Planing-mill Company, Per J. F. Donnell, Treasurer; accepted, G. W. Lightner," is a negotiable bill of exchange, payable absolutely. The words "on account of contract," etc., are not a direction to charge a particular fund, and merely indicate the fund to which the drawee is to look for reimbursement. (Kan.) *First Nat. Bank v. Lightner*, 353.

2. **BILLS AND NOTES—Lost Notes—Allegation and Proof.**—In an action to recover on a mortgage note, a copy of which is set forth in the complaint, evidence of loss of the note and of its execution and contents is admissible, although no allegation of its loss is made in the complaint. (Kan.) *Bare v. Ford*, 336.

3. **BILLS AND NOTES.—The Undertaking of the Indorser of a check is,** that if the check is not paid on presentation within a reasonable time he will pay it, provided he is properly notified. The reasonable time for presentation and demand for payment is within the day following the indorsement. (Mich.) *First Nat. Bank v. Currie*, 537.

Certification of Check.

4. **BILLS AND NOTES.—The Certification of a Check on presentation by an indorsee is equivalent to payment, discharging the drawer as well as the indorsers, notwithstanding the absence of funds.** (Mich.) *First Nat. Bank v. Currie*, 537.

5. **BILLS AND NOTES.—The Certification of a Check on presentation by the indorsee discharges the indorser, although the check is presented, payment refused, and the indorser notified within the time within which notice would have been given had there been no certification.** (Mich.) *First Nat. Bank v. Currie*, 537.

6. **BILLS AND NOTES.—The Certification of a Check procured by an indorsee, who thereupon parts with value, creates a new contract, whereby the certifying bank becomes the primary debtor.** (Mich.) *First Nat. Bank v. Currie*, 537.

7. **BILLS AND NOTES.—Where an Indorsee of a Check Procures Its Certification and then parts with value, the subsequent insolvency of the certifying bank is immaterial on the question of the indorser's liability.** (Mich.) *First Nat. Bank v. Currie*, 537.

8. **BILLS AND NOTES.—Where the Indorser of a Check has been discharged by the indorsee procuring a certification, the consent of the indorser to an extension of time for payment does not revive his liability, since there is no consideration for his promise.** (Mich.) *First Nat. Bank v. Currie*, 537.

Demand of Payment and Notice of Dishonor.

9. **BILLS AND NOTES.—The Indorsee of a Check, as between himself and the indorser, undertakes to demand payment within the**

day following the indorsement, and, if payment is not made, to give due notice of dishonor. (Mich.) *First Nat. Bank v. Currie*, 537.

10. **BILLS AND NOTES.**—The Fact that There are No Funds in the account against which a check is drawn does not relieve the holder from the duty of presenting it and giving notice of dishonor, unless the indorser knows the facts. (Mich.) *First Nat. Bank v. Currie*, 537.

11. **BILLS AND NOTES.**—The Right of the Indorser of a Check to presentation and notice of dishonor is not changed because he will suffer no apparent damage from a failure of the indorsee to take these steps. (Mich.) *First Nat. Bank v. Currie*, 537.

12. **WAIVER in Ignorance of Legal Effect of Known Pre-existing Facts.**—If one who signs a waiver of demand, notice and protest of a promissory note knows of the absence of such demand, notice and protest, his waiver is effective, though he did not know that such absence had relieved him from liability. (Mass.) *Toole v. Crafts*, 455.

13. **FRAUD, Evidence of.**—In an action against the indorser of a note who had been released by the failure to make demand for payment and give notice of dishonor, but who had thereafter executed a written waiver of such demand and notice, and claims that such waiver was procured by fraudulent misrepresentation, he should be permitted to testify that when he signed the waiver he did not know that he had been released from liability. Such evidence, though not admissible for the purpose of diminishing the effect of the waiver, is relevant upon the issue of fraud. (Mass.) *Toole v. Crafts*, 455.

See Banks and Banking.

BREACH OF PROMISE TO MARRY.

1. **BREACH OF MARRIAGE PROMISE—Death of Obligor.**—The obligation to fulfill a promise of marriage is personal and not heritable, and the obligation to respond in damages for the breach of such promise is incidental thereto, and if the obligor die before compliance with his promise and before he is put in default, no action will lie against his heirs to recover damages for noncompliance. (La.) *Johnson v. Levy*, 378.

2. **BREACH OF MARRIAGE PROMISE—Death of Obligor—Recovery from Heirs.**—If the obligee in a marriage promise obtains judgment against the obligor for the damages resulting from a breach of his promise, such judgment may be enforced against his heirs in the event of his death before satisfying it. (La.) *Johnson v. Levy*, 378.

3. **BREACH OF MARRIAGE PROMISE—Death of Obligor—Recovery from Heirs.**—An obligor in a promise to marry may abandon his right to comply with his promise and voluntarily bind himself to pay the damages resulting from his noncompliance, and the obligation thus assumed may be enforced against his heirs in the event of his death. (La.) *Johnson v. Levy*, 378.

4. **BREACH OF MARRIAGE PROMISE—Default and Death of Obligor—Recovery from Heirs.**—If the obligor in a promise to marry is put in default according to law, his right to fulfill his promise is thereby forfeited, and his obligation to marry becomes merged in his obligation to respond in damages, which becomes heritable and may be enforced against his heirs in the event of his death. (La.) *Johnson v. Levy*, 378.

5. BREACH OF MARRIAGE PROMISE—Damages—Injury to Feelings and Reputation.—Damages arising from a breach of promise to marry resulting in injury to feelings, reputation and standing are actual or compensatory, as contradistinguished from exemplary, and if the liability of the obligor is fixed, by his being put in default according to the statute, they may be recovered in the same manner and to the same extent as damages to person or property. (La.) *Johnson v. Levy*, 378.

BRIBERY.

1. BRIBERY—Proof of Other Crimes.—While the prosecution cannot show separate and isolated crimes or facts having no bearing upon the crime under investigation, it may show all the circumstances connected with the particular crime, even if in so doing it has to bring to light other offenses. It may go back to the time when the intention to commit the crime in question was first formed, and trace it through all the intervening circumstances to the consummation of the criminal act, and thus lay before the jury the whole transaction. (Ark.) *Butt v. State*, 42.

2. BRIBERY—Evidence—Statement in Presence of Accused.—In the prosecution of a senator for bribery, it is competent to prove that, prior to the commission of the crime, another senator, in the presence of the defendant, suggested an organization to control legislation and exact money for the passage or defeat of bills, to which the defendant assented. (Ark.) *Butt v. State*, 42.

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CARRIERS.

Of Goods.

1. CARRIER—Notice of Injury as Condition Precedent to Recovery.—A condition in a bill of lading for the shipment of livestock, made in consideration of a reduced rate, that, as a condition precedent to a recovery of damages for injuries to the animals, the shipper must give notice before they are mingled with other stock and within one day after their delivery at their destination, is reasonable and binding, and places the burden on the shipper of showing that he gave such notice. (Ark.) *St. Louis etc. R. R. Co. v. Pearce*, 75.

2. CARRIER—Delay in Shipment—Market Reports as Evidence of Value.—Standard market reports of the price of livestock during the period of a delay in the shipment of livestock are admissible in evidence in an action against the carrier for losses occasioned to the shipper by such delay. (Ark.) *St. Louis etc. R. R. Co. v. Pearce*, 75.

3. CARRIER—Contract for Prompt Delivery Implied.—Where a contract for the transportation of livestock does not expressly require the carrier to make a delivery in time for any special market, the law implies a contract to deliver with reasonable promptness and without unnecessary delay. (Ark.) *St. Louis etc. R. R. Co. v. Pearce*, 75.

4. CARRIER—Contracts Restricting the Liability of a carrier, or releasing it from a liability already accrued to the shipper, must

be reasonable and based upon a consideration. (Ark.) St. Louis etc. R. R. Co. v. Pearce, 75.

5. **CARRIER—Release of Liability.**—If a Carrier is already liable to a shipper for a failure to furnish cars, it has no right to require a release of this liability before according to him the privilege of shipping upon terms the same as those given to other shippers who assert no claim for damages. (Ark.) St. Louis etc. R. R. Co. v. Pearce, 75.

6. **CARRIERS.—A Contract Limiting the Liability** of a carrier is valid when not forced upon the shipper. Therefore, he cannot evade such a contract by proving that he signed it without reading, and that the agent did not inform him of another rate under a contract of unrestricted liability, unless upon demand the agent refused to give such information or to accept the shipment under an unrestricted liability. (Ark.) St. Louis etc. R. R. Co. v. Pearce, 75.

7. **CARRIERS—Proper Cars for Shipment of Fruit.**—Where a carrier accepts perishable fruit to ship to market, it is its duty to furnish cars especially adapted to the preservation thereof during transportation. (Ark.) St. Louis etc. Ry. Co. v. Renfroe, 58.

8. **CARRIERS—Duty to Ice Refrigerator-Car.**—When a carrier undertakes to transport fruit in a properly iced refrigerator-car, it is liable for a failure to comply with such undertaking, although it has an agreement with an independent contractor to furnish the car and the refrigeration therefor. (Ark.) St. Louis etc. Ry. Co. v. Renfroe, 58.

Connecting Carriers.

9. **CONNECTING CARRIERS—Presumption of Negligence.**—The presumption that in case of damage to goods which have been shipped over connecting railway lines the delivering carrier caused the injury obtains only in the absence of any proof locating the negligence. (Ark.) St. Louis etc. Ry. Co. v. Renfroe, 58.

10. **CONNECTING CARRIERS—Presumption of Negligence.**—In an action against an initial carrier of two or more connecting lines, the burden of proof is upon the plaintiff to show that the damages occurred on its line; but in a suit against the last or delivering carrier, the burden is upon it to show that the damage was not done on its line. (Ark.) St. Louis etc. R. R. Co. v. Pearce, 75.

Of Passengers.

11. **CARRIER—Passenger on Free Pass.**—A railway company is liable for its negligence to a passenger riding on a free pass which stipulates that the person accepting it "assumes all risk of accidents and damages without claim upon the company," for such a stipulation is against public policy. (Ark.) St. Louis etc. Ry. Co. v. Pitcock, 84.

12. **CARRIERS OF PASSENGERS for Hire Must Use the Highest Degree of Care** consistent with the nature and extent of their business to provide safe and suitable vehicles for their carriage, and to maintain all such reasonable arrangements for the control and supervision of passengers and of their own servants as prudence dictates against all dangers that are naturally and according to the usual course of business to be expected. Such carriers are bound to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of that high degree of diligence and care to which they are held, they ought reasonably to have anticipated. (Mass.) Kuhlen v. Boston etc. Ry. Co., 516.

13. CARRIERS OF PASSENGERS, Duty of to Protect from Other Passengers.—The duty of a carrier of passengers for hire to use all proper means and precautions to protect its passengers against injury caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is not less stringent than the obligation to prevent misconduct or negligence on the part of its own servants. (Mass.) *Kuhlen v. Boston etc. Ry. Co.*, 516.

14. CARRIERS OF PASSENGERS, Liability of for Injuries Due to Pushing and Crowding at Stations.—If a passenger, in entering a car, is pushed and crowded by other passengers, and thereby receives personal injuries, resulting in the fracture of her wrist, the railroad company may be held answerable, if, in the opinion of the jury, based upon and sustained by the evidence, the carrier ought to have anticipated what took place, and, in the exercise of ordinary care, ought to have taken reasonable precautions to guard against such injuries as were caused to the plaintiff, and was negligent in failing to take such precautions and to give plaintiff the adequate protection which she had the right to expect. (Mass.) *Kuhlen v. Boston etc. Ry. Co.*, 516.

15. CARRIERS OF PASSENGERS, Negligence in not Preventing Crowding at Stations.—If there is danger to passengers at a station at certain hours of the day from the crowding and pushing by other passengers, the jury should be left to say whether an increased number of servants should have been employed by the carrier to prevent such pushing and crowding and the consequent danger to passengers. (Mass.) *Kuhlen v. Boston etc. Ry. Co.*, 516.

16. CARRIERS OF PASSENGERS—Contributory Negligence, When not Imputable to Passenger on Entering a Station or Car Where There is Crowding and Pushing by Other Passengers.—Though a woman has been in crowds before at a railway station and seen the failure of a carrier to control them, it cannot be held, as a matter of law, that she was not in the exercise of due care because she entered a station where such crowding and pushing were probable, and suffered injury therefrom. All these circumstances are important to be considered by the jury, but are not conclusive against her. (Mass.) *Kuhlen v. Boston etc. Ry. Co.*, 516.

17. CARRIERS OF PASSENGERS, Liability of, When not Excluded by the Fact that the Carrier did not Own or have Absolute Control of the Station Where Crowding and Pushing Occurred.—Though the station at which the pushing and crowding by passengers in attempting to enter cars occurred was not owned by, nor under the control of, the carrier, except that it might make regulations by the permission of a municipal transport commission, it is not relieved from liability to a passenger injured by the pushing and crowding by other passengers, if no rules had been adopted and no measures taken by which to prevent such crowding and pushing, and the carrier had held the place out as a proper one for its passengers to come for the purpose of taking its cars. (Mass.) *Kuhlen v. Boston etc. Ry. Co.*, 516.

18. RAILROAD—Passengers—Conclusiveness of Ticket.—If a person on a railroad train proposes to pay his fare by ticket, he must be provided with and tender one that under the established rules of the company has the intrinsic effect of paying such fare, and in the determination of the right to travel under the ticket tendered as fare, conclusive force to be given to the intrinsic effect of such ticket as expressed on its face. (N. J. L.) *Shelton v. Erie R. R. Co.*, 704.

19. RAILROADS—Passengers—Ticket as Fare.—A purchase of a ticket by a passenger is not the payment of his fare. When the ticket is accepted by the train conductor it becomes a fare, but not before. (N. J. L.) *Shelton v. Erie R. R. Co.*, 704.

20. RAILROADS—Expulsion of Passengers for Failure to Present Proper Ticket, Though He Paid Therefor.—A person on a railroad train who refuses to pay fare other than to tender to the conductor a limited ticket which on its face shows that it has expired, may be lawfully expelled from the train, although he has paid for such ticket the full rate asked by the railroad company for an unlimited ticket. (N. J. L.) *Shelton v. Erie R. R. Co.*, 704.

21. RAILROADS—Expulsion of Passenger—Failure to Pay Fare. The expulsion from a railroad train by a conductor of a passenger who neither pays his fare nor tenders a ticket that evinces his right to carriage is, in the absence of unnecessary force, not actionable. (N. J. L.) *Shelton v. Erie R. R. Co.*, 704.

22. CARRIERS—Expulsion of Passenger—Damages for Humiliation.—When a passenger voluntarily suffers or seeks his expulsion from a train in order to lay the foundation of a damage suit, he is not entitled to recover for his humiliation in being expelled. (Ark.) *Brenner v. Jonesboro etc. R. R. Co.*, 56.

23. RAILROADS—Passengers—Negligence—Proximate Cause.—If a conductor, in pushing his way through a crowded car, presses a standing passenger against a seated passenger, who gives the standing passenger such a push as to throw him from the car, to his great injury, the proximate cause thereof is the action of the seated passenger, and the railroad company is not liable therefor. (Colo.) *Snyder v. Colorado Springs etc. Ry. Co.*, 110.

Passengers on Street Railway.

24. STREET RAILWAYS—Conductor must be Controlled by the Face of Transfers.—A transfer ticket is the only evidence of the right of the passenger which the conductor can properly accept, and if such ticket does not appear to be for the conductor's line, the passenger has no right to ride thereon, though the reading of the ticket is due to the mistake of a prior conductor, for which the passenger is not at fault. (Conn.) *Norton v. Consolidated Ry. Co.*, 132.

25. STREET RAILWAYS.—Though a Conductor Gives a Passenger a Transfer Different from that for Which He Asks, the remedy is not by refusing to pay fare and resisting expulsion from a car, but by leaving the car, or paying a new fare, and commencing an action against the railway company for its breach of contract to give a proper transfer. (Conn.) *Norton v. Consolidated Ry. Co.*, 132.

26. STREET RAILWAYS—Right of the Person to Whom an Erroneous Transfer has been Given.—Though a passenger on a street railway demands a proper transfer, and by the mistake or carelessness of the conductor is given one for another line, such passenger has no right to resist expulsion if he enters a car of a line over which his transfer does not entitle him to ride, though he explains the mistake to the conductor. (Conn.) *Norton v. Consolidated Ry. Co.*, 132.

27. STREET RAILWAYS.—It is not the Duty of the Conductor to Accept a Statement by a Passenger that a Mistake in His Transfer is the Fault of a Prior Conductor.—As between the passenger and the conductor to whom the transfer is presented, it is conclusive. (Conn.) *Norton v. Consolidated Ry. Co.*, 132.

28. A STREET RAILWAY CORPORATION is not Liable to a Passenger in an Open Car injured by being struck by the wadding

of a cannon fired with a blank cartridge by a citizen, who, with and by the firing of such cannon, was, and during the day preceding had been, celebrating the Fourth of July, though the car was not stopped on approaching the place where the cannon was being discharged, nor were any precautions taken to guard the passengers against injurious consequences. (Mass.) *Ormandroyd v. Fitchburg etc. Ry. Co.*, 457.

29. **A STREET RAILWAY COMPANY** is not Responsible for the Condition of a Street, nor answerable to passengers injured by its want of safety. (Mass.) *Thompson v. Gardner etc. Ry. Co.*, 459.

30. **A STREET RAILWAY COMPANY** is not Under Any Duty to Caution Passengers in alighting from cars against stepping into a gutter or defect in the street for the existence of which the corporation is not blamable, and a passenger injured by so stepping cannot recover. (Mass.) *Thompson v. Gardner etc. Ry. Co.*, 459.

Baggage.

31. **CARRIERS, Liability of for Baggage.**—When a carrier does not take full possession of baggage and it remains under the control of the passenger, the former does not, in the absence of a special agreement, assume the common carrier's liability of an insurer, but becomes responsible only when it is shown to have failed in the exercise of reasonable care to protect from loss or injury such baggage or property as the passenger has the right to bring with him into the car. (Conn.) *Sperry v. Consolidated Ry. Co.*, 169.

32. **STREET RAILWAYS, Rules of Respecting Baggage.**—Street railway companies may make reasonable regulations concerning the kind and size of baggage and packages which may be brought into cars by passengers. (Conn.) *Sperry v. Consolidated Ry. Co.*, 169.

33. **STREET RAILWAYS, When do not Assume the Custody of Baggage.**—A conductor of a street railway who takes the baggage of a passenger when handed to him and places it within the sight and control of such passenger does not thereby assume the custody of the baggage so as to make his employer answerable therefor. (Conn.) *Sperry v. Consolidated Ry. Co.*, 169.

34. **STREET RAILWAYS—Negligence Respecting Baggage, When not Shown.**—If the conductor of a street railway car, in assisting a passenger, takes his baggage and places it on the car in the sight of the passenger, the conductor does not assume the care or control thereof, and if a second conductor, not knowing to whom the baggage belongs, sees it taken away by a man who had been sitting near it, and makes no attempt to reclaim it, the street railway company is not guilty of any negligence respecting such baggage and is not answerable for its loss. (Conn.) *Sperry v. Consolidated Ry. Co.*, 169.

See Railroads.

CERTIFIED CHECK.

See Bills and Notes, 4-8.

CHARITIES.

1. **PUBLIC CHARITIES, What are.**—A gift for the sole purpose of affording education and maintenance for destitute boys, without compensation, creates a valid public charity. (Mass.) *Farrigan v. Pevear*, 484.

2. PUBLIC CHARITIES, if Incorporated, are exempt from actions founded on the negligence of attendants or servants. (Mass.) *Farrigan v. Pevear*, 484.

3. PUBLIC CHARITIES, Nonliability of Trustees of Unincorporated.—The trustees of an unincorporated public charity are not liable for injuries due to the negligence of attendants or servants in whose selection reasonable care was used. (Mass.) *Farrigan v. Pevear*, 484.

CHATTEL MORTGAGE.

1. CHATTEL MORTGAGES—Oral Agreement.—If a father loans his son money with which to purchase a stock of goods and establish a business, the son orally agreeing that his father shall be secured by the goods for the original and future loans, such agreement constitutes a valid chattel mortgage as between the parties. (Vt.) *Mower v. McCarthy*, 942.

2. CHATTEL MORTGAGES—Oral Agreement.—A verbal mortgage of chattels to be subsequently acquired is valid as between the parties. (Vt.) *Mower v. McCarthy*, 942.

3. CHATTEL MORTGAGES—Possession—After-acquired Property.—If it is stipulated that a chattel mortgagor may sell portions of the mortgaged property from time to time, in the ordinary course of business, and replace that sold with other property of similar kind and value, such after-acquired property on the mortgagee's taking possession of it becomes subject to the lien of the mortgage as of the date thereof. (Vt.) *Mower v. McCarthy*, 942.

4. CHATTEL MORTGAGES—Bankruptcy—After-acquired Property.—A chattel mortgage on after-acquired property, under which the mortgagee has taken possession with the mortgagor's consent, is valid as against the mortgagor's trustee in bankruptcy in the absence of an express finding that such possession was taken for the purpose of affording a preference, though possession was so acquired within four months prior to the date of the mortgagor's petition in bankruptcy, and with knowledge that the mortgagor was insolvent and contemplating bankruptcy proceedings. (Vt.) *Mower v. McCarthy*, 942.

5. CHATTEL MORTGAGES—After-acquired Property.—A chattel mortgage on a stock of goods may be made to cover goods subsequently acquired to replenish the stock. (Vt.) *Mower v. McCarthy*, 942.

6. CHATTEL MORTGAGES—Bankruptcy—Liens.—The national bankruptcy act providing that where a preference consists of a transfer, the period of four months shall not expire until four months after the date of the recording or registering of the transfer is required, does not apply to a lien given by an oral chattel mortgage. (Vt.) *Mower v. McCarthy*, 942.

7. CHATTEL MORTGAGES—Right to Possession.—If a father loans money to his son to enable the latter to go into business, and takes an oral chattel mortgage on the stock to be purchased to secure such loan, on the son's failure to repay it, the mortgagee is entitled, as against the mortgagor's creditors, to take possession of the goods, and such possession relates to the time of the execution of the mortgage. (Vt.) *Mower v. McCarthy*, 942.

8. CHATTEL MORTGAGES—Innocent Purchaser.—A purchaser of grain from the mortgagor is not protected as an innocent purchaser by the mere fact that the mortgagee allowed the mortgagor

to thresh and sell the grain, when such purchaser had constructive notice by the record of the existence of such mortgage. (Minn.) *Endreson v. Larson*, 631.

9. SEED GRAIN NOTE—Second Mortgage—Priorities—Evidence. A lien attaching to a crop to be grown by virtue of a seed grain note has priority over a lien upon the same crop acquired by means of a previously executed and filed chattel mortgage, and the purchaser of such grain from the mortgagor is entitled, as against the claim of the chattel mortgagee, to pay off such seed grain note. In such case the note and evidence of its payment are admissible in evidence. (Minn.) *Endreson v. Larson*, 631.

10. MORTGAGE to Secure Seed Grain Note, Necessity for Preceding Delivery of the Grain.—A seed grain note is not void for the reason that the grain was not delivered at or before the execution of the note, if the note was made pursuant to a contract by which the payee was to furnish the seed and it was delivered to the maker shortly thereafter. (Minn.) *Endreson v. Larson*, 631.

11. MORTGAGE OF CHATTELS—Misapplication of Proceeds of Sale of Another Mortgage to Secure the Same Debt.—Where a real estate mortgage is given to secure two notes, one of which is also secured by a chattel mortgage, and the former mortgage is foreclosed and a sale made thereunder, after which the chattel mortgage is foreclosed and a sale made under it, the title of the purchaser cannot be avoided by a third person on the ground that under section 4465, Revised Laws of Minnesota, the proceeds of the sale under the real estate mortgage ought to have been first applied to the satisfaction of the note secured by the chattel mortgage. (Minn.) *Endreson v. Larson*, 631.

CHECKS.

See Banks and Banking; Bills and Notes.

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See Quieting Title.

CONDITIONS SUBSEQUENT.

See Deeds, 8-12.

CONFLICT OF LAWS.

See Contracts, 7, 8; Limitation of Actions.

CONSPIRACY.

1. CONSPIRACY—Evidence—Declarations of Conspirator.—When a conspiracy has been shown, the acts and declarations of one conspirator in furtherance of the common design may be shown as evidence against his associates. (Ark.) *Butt v. State*, 42.

2. CONSPIRACY—When Inferred.—If the Acts of two or more persons are aimed toward the accomplishment of some unlawful object, each doing a part, so that their acts, though apparently independent, are in fact connected, indicating a closeness of association and a concurrence of sentiment, a conspiracy may be inferred, although no actual meeting among them to concert means is proved. (Ark.) *Butt v. State*, 42.

3. CONSPIRACY—Order of Proof.—It is immaterial whether the evidence showing a conspiracy is introduced before or after the acts of the conspirators are received in evidence, if upon the whole case a conspiracy is shown. (Ark.) *Butt v. State*, 42.

4. CONSPIRACY, Special Action for.—When an injury to an employé by causing his discharge results from a conspiracy, it is the wrongful act done in carrying out a concerted plan, and not the conspiracy itself, which furnishes the real ground for the special action. (Conn.) *Wyeman v. Deady*, 152.

5. CONSPIRACY.—Threats Coupled with Damage necessarily flowing therefrom in the prosecution of a conspiracy to do an unlawful act are sufficient to constitute a good cause of action. (Md.) *Klingel's Pharmacy v. Sharp*, 399.

6. EVIDENCE — Conspiracy — Declarations.—If an attempt is made to show a conspiracy, a foundation must first be laid by proof sufficient to establish *prima facie* the fact of the conspiracy, before the admissions of an alleged conspirator can be admitted. (Vt.) *Mower v. McCarthy*, 942.

CONSTITUTIONAL LAW.

In General.

1. CONSTITUTIONAL LAW—Privileges of Citizens.—A constitutional guaranty that the citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states does not guarantee to the citizens of another state, while resident there, all the privileges in a sister state that they would enjoy if resident therein. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

2. **CONSTITUTIONAL LAW—Limit of Legislative Power.**—There is no limit upon the power which a state legislature may exercise except that found either in the state or national constitutions. (Kan.) *Ratcliff v. Wichita Union etc. Co.*, 298.

3. **CONSTITUTIONAL LAW—Ratification by Legislature.**—Legislative acts which are void because unconstitutional cannot acquire validity from subsequent legislation. (Ohio St.) *Thomas v. State*, 884.

4. **CONSTITUTIONAL LAW—Privilege Granted to Railroad.**—The legislature may, by appropriate enactment, alter the charter of a railroad company, and a statute is not rendered unconstitutional by reason of a provision that railroads constructed and operated under a special charter are permitted to charge more per mile than those organized and operated under a general charter. Such discrimination is not based upon an illusory classification. (N. J. L.) *Shelton v. Erie R. R. Co.*, 704.

Right to Contract and Acquire Property.

5. **CONSTITUTIONAL LAW—Right to Acquire Property.**—A constitutional right to acquire, possess and protect property does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law, nor the right of disposing of property that has not been duly acquired under the law of the land. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

6. **CONSTITUTIONAL LAW—Right to Engage in Business or Labor.**—The liberty of the citizen entitles every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellowmen, saving such as may result from the exercise of equal or superior rights on their part. (N. J. L.) *Brennan v. United Hatters of N. A., Local No. 17*, 727.

7. **CONSTITUTIONAL LAW—Right to Contract.**—As a part of the constitutional right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services, which amount to the purchase and sale of labor. (N. J. L.) *Brennan v. United Hatters of N. A., Local No. 17*, 727.

Obligation of Contracts.

8. **CONSTITUTIONAL LAW—Obligation of Contracts—Change in Judicial Opinion.**—A change in judicial opinion in respect to the constitutionality of a statute is in its operation upon pre-existing contracts the same as will be given a statute, viz., it operates prospectively and not retrospectively. (Ohio St.) *Thomas v. State*, 884.

9. **CONSTITUTIONAL LAW—Change in Judicial Opinion.**—Contracts executed under the favor of statutes which the highest courts of the state have declared valid are themselves valid as against subsequent decisions to the contrary. (Ohio St.) *Thomas v. State*, 884.

10. **CONSTITUTIONAL LAW—Change of Judicial Opinion of Which Contractors Need not Take Notice.**—Where a particular statute has been declared valid by the highest courts of the state, parties contracting under it remain entitled to its protection, although subsequent decisions have declared general principles inconsistent with the prior decision. The court of last resort having affirmed the validity of particular legislation, the assurance so given can be

withdrawn only by a contrary decision with respect to the same legislation, or like legislation upon the same subject. (Ohio St.) *Thomas v. State*, 884.

Police Power.

11. **CONSTITUTIONAL LAW—Police Power.**—The legislature may limit and regulate personal rights and rights of property in the interest of the public health, morals and safety. (Mass.) *Welch v. Swasey*, 523.

12. **CONSTITUTIONAL LAW—Stockyards—Business Affected with Public Interest.**—A stockyard business, located in a large city, at the junction of many railroad lines, furnishing the only proper facilities for the unloading, resting and feeding of livestock in transit, and for the sale of cattle within such city, is affected with public use and interest, which the state, in the exercise of its police power, may subject to regulation and control, and prescribe a reasonable maximum rate of compensation for the care and handling of stock thereat. (Kan.) *Ratcliff v. Wichita Union etc. Co.*, 298.

13. **CONSTITUTIONAL LAW—Corporations—Business Clothed with Public Interest—Regulation of Charges.**—Courts will not grant relief against legislation fixing rates for corporations engaged in a business clothed with a public interest, unless they are so unreasonable as practically to destroy the value of the property used in the business. The basis for testing the reasonableness of rates charged under legislative sanction must be a fair profit on the fair value of the property in use. (Kan.) *Ratcliff v. Wichita Union etc. Co.*, 298.

Building Regulations.

14. **CONSTITUTIONAL LAW—Limiting the Height of Buildings.**—The legislature may limit the height of buildings in a city, so that none can be erected above a prescribed number of feet. (Mass.) *Welch v. Swasey*, 523.

15. **CONSTITUTIONAL LAW—Different Heights of Buildings in Different Districts.**—The legislature may classify the different parts of a city, so that in some parts one height is prescribed for buildings, and in others a different height. (Mass.) *Welch v. Swasey*, 523.

16. **CONSTITUTIONAL LAW—Height of Buildings, Delegation to Commission of the Power to Prescribe.**—It is permissible to delegate to a commission the determination of the boundaries of the districts in which buildings may be at different heights. (Mass.) *Welch v. Swasey*, 523.

17. **CONSTITUTIONAL LAW—Height of Buildings.**—To a commission may be delegated the making of rules and regulations such as permit different heights of buildings in different parts of one of the general classes of territory. (Mass.) *Welch v. Swasey*, 523.

18. **CONSTITUTIONAL LAW—Height of Buildings.**—The regulations of a commission authorized to fix the height of buildings may be tested by the courts to see whether they are reasonably necessary to the accomplishment of the purpose on which the constitutional authority to fix the height of buildings rests. Though a rule or ordinance will not be held void merely because the courts differ from the legislature as to the expedience of its provisions, yet if a regulation or ordinance is arbitrary and unreasonable, so as necessarily to be subversive of the rights of property, it will be set aside by the courts. (Mass.) *Welch v. Swasey*, 523.

19. **CONSTITUTIONAL LAW—Building, Regulations of the Height of with Respect to the Widths of Public Streets.**—The court

cannot say that a regulation that a building in a designated class shall not be a greater height than eighty feet unless its width on each and every public street on which it stands will be at least one-half of its height was entirely for aesthetic reasons. (Mass.) *Welch v. Swasey*, 523.

See Party-walls, 1; Statutes; Quieting Title, 1; Waters and Water-courses, 1, 2.

CONTRACTS.

Offer and Acceptance.

1. **CONTRACTS—Offer and Acceptance.**—If a letter from one person to another states, "Kindly advise us by wire Monday if you can use 1,500 creosote barrels between now and January 1st at 95 cents, delivered in carload lots," such letter is a mere trade inquiry, and is not a legal offer binding on acceptance. (N. C.) *Cherokee Tanning Extract Co. v. Western Union Tel. Co.*, 806.

2. **CONTRACTS—Offer and Acceptance.**—An offer, to constitute a contract, must be one which is intended of itself to create legal relations on acceptance, and if it is an offer merely to open negotiations which may ultimately result in a contract, it is not binding. (N. C.) *Cherokee Tanning Extract Co. v. Western Union Tel. Co.*, 806.

3. **CONTRACTS—Offer and Acceptance.**—An acceptance of an offer to constitute a contract and bind the other party must be unconditional and unqualified, and must correspond exactly to the terms of the offer. (N. C.) *Cherokee Tanning Extract Co. v. Western Union Tel. Co.*, 806.

Validity and Effect.

4. **CONTRACTS Under Assumed Name.**—One not engaged in a fraudulent or criminal purpose may enter into a contract under any name he may choose, and the act is binding upon him, and upon others. (Md.) *Hartman v. Thompson*, 422.

5. **CONTRACTS—Gaming—Illegal Employment—Recovery of Salary.**—A manager of a gambling-house employed by the year and discharged before the expiration of his term, without cause, cannot recover a share of the profits of the establishment which he was to have received in lieu of salary. (La.) *Britt v. Davis Brothers*, 390.

6. **CONTRACTS—Public Policy—Right to Recover on Independent Ground.**—If a person has entered into a contract, void because contrary to public policy, his right to recover upon a ground of action that exists independent of the contract is not overthrown by the operation of the maxim *in pari delicto*. (N. J. L.) *Brennan v. United Hatters of North America, Local No. 17*, 727.

Conflict of Laws.

7. **CONTRACTS—Lex Loci Contractus—Exceptions.**—Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made, except when it is contrary to good morals, or when the state of the forum or its citizens would be injured by its enforcement, or when the contract violates the positive legislation of the state of the forum, or when it violates the public policy of such state. (N. C.) *Canaday v. Atlantic Coast Line R. R. Co.*, 821.

8. **CONTRACTS—Conflict of Laws—Comity.**—If a person enters into a contract of employment with a railroad company in one state,

and also a contract with it by which he agrees that his acceptance of benefits from it for injuries sustained should operate as a release and satisfaction of all claims against the company growing out of such injuries, and he is injured in that state by the company's negligence and accepts and receives such benefits, and the courts of that state have interpreted such contract as an agreement to elect, in case of injury, either to accept the benefits and release the company, or waive them and sue for negligence, and that an election to accept benefits is a release of the action for negligence, such interpretation is binding on the courts of another state, and in such case no action can be maintained therein. (N. C.) *Cannaday v. Atlantic Coast Line R. R. Co.*, 821.

CONVERSION.

See *Troyer*.

CONVEYANCES.

See *Deeds*.

CORPORATIONS.

In General.

1. **CORPORATION.—A Corporation De Facto Exists** when the company has made an honest attempt to organize under a law authorizing it, and is doing business as an incorporated company, but has not recorded its certificate of incorporation. (Ill.) *Marshall v. Keach*, 247.

2. **CORPORATION.—One Who Owns a Majority of the Shares of the stock in a corporation is entitled to control its business.** (Ark.) *Culver Lumber etc. Co. v. Culver*, 17.

3. **CORPORATIONS—Power of Director to Bind.**—A director in a corporation has no authority, merely as a director, to act for the corporation, except in his place as a member of the board of directors, although he owns a majority of the corporate stock. (N. J. Eq.) *Clement v. Young-McShea etc. Co.*, 747.

4. **CORPORATIONS—Repeal of Right or License.**—If a corporate charter is by the express terms of the statute creating it repealable, no right or license that arises solely out of its terms, and that has not been acted upon, can be deemed to be beyond revocation by the legislature. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

Transfer of Stock.

5. **CORPORATION—Implied Warranty on Transfer of Stock.**—There is no implied warranty on the part of a vendor of certificates of stock that the corporation issuing them is a corporation de jure as distinguished from a corporation de facto. (Ill.) *Marshall v. Keach*, 247.

6. **CORPORATION—Implied Warranty on Transfer of Stock.**—The term "inc." inserted after the corporate name of the vendor in a contract for the exchange of a farm for shares of stock in the corporation is not a warranty that the company is a corporation de jure. (Ill.) *Marshall v. Keach*, 247.

Dividends.

7. **CORPORATIONS—Dividends, When Treated as Income, and When as Capital.**—Cash dividends are regarded as income passing to

the life tenants, and stock dividends as capital inuring to the benefit of the remaindermen. (Conn.) *Green v. Bissell*, 156.

8. **CORPORATIONS.—The Declaration of a Stock Dividend Involves the creation and issuing of new stock.** (Conn.) *Green v. Bissell*, 156.

9. **CORPORATIONS.—The Holding of the Respective Stockholders After the Issue of a Stock Dividend Bears the Same Relation to the outstanding shares as did previous holdings of each.** (Conn.) *Green v. Bissell*, 156.

10. **CORPORATIONS.—A Cash Dividend is a Distribution to the Stockholders, as the reward of the corporate enterprise, of the profits or surplus assets of the corporation. The dividend is usually, but not necessarily, in cash. It may be in other property.** (Conn.) *Green v. Bissell*, 156.

11. **CORPORATE STOCK, Distribution of, When Must be Regarded as a Cash Dividend.—**The distribution among the shareholders of a corporation of shares of stock received in payment of indebtedness due to the corporation must be treated as cash and not as stock dividend, as income and not as capital, and as between tenants for life entitled to receive the income and remaindermen entitled to the capital, such dividend must be paid to the former. (Conn.) *Green v. Bissell*, 156.

Stockholders' Liability.

12. **CORPORATIONS — Insolvency — Stockholders' Liability — Trustee in Bankruptcy.—**The statutory liability of a stockholder to pay a certain amount upon the debts of the corporation becomes an asset of the corporation in the event of its insolvency. Such liability and the right of action to enforce it arise upon contract and pass to a trustee in bankruptcy upon his due appointment and qualification. (Kan.) *Stocker v. Davidson*, 315.

13. **CORPORATIONS—Insolvency—Stockholders' Liability—Suit by Trustee in Bankruptcy.—**A stockholder's liability in an insolvent corporation may be enforced by a trustee in bankruptcy of such corporation, without judgment against it having first been obtained by its creditors and execution returned unsatisfied, and without the appointment of a receiver for such corporation by the state court. (Kan.) *Stocker v. Davidson*, 315.

Service of Process.

14. **CORPORATIONS.—Service of Process upon a corporation or on its officer or agent, whose relation to the plaintiff or to the claim in suit is such as to make it to his interest to suppress the fact of service, is unauthorized.** (Mich.) *Atwood v. Sault Ste. Marie Light etc. Co.*, 576.

15. **CORPORATIONS—Service of Process upon Assigned Claim.—**If suit is brought against a corporation on an assigned claim for personal services, service of process on the corporate officer who assigned the claim is unauthorized. (Mich.) *Atwood v. Sault Ste. Marie Light etc. Co.*, 576.

See Receivers.

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COURTS.

COURTS.—The Circuit Court has No Original Jurisdiction to entertain an action on a note for one hundred dollars and interest, though joined with another note of which it has jurisdiction. (Ark.) Skillern v. Baker, 52.

CRIMINAL LAW.

In General.

1. **CRIMINAL LAW.**—To Deprive a Workman of Employment by Threatening and Intimidating His Employer is a criminal offense under a statute making it criminal to threaten or use any means to intimidate any person to compel him to do or abstain from doing, against his will, any act which he has a right to do or refrain from doing. (Conn.) Wyman v. Dedy, 152.

2. **CRIMINAL LAW**—**Doctrine of Reasonable Doubt.**—The different items of evidence that go to establish guilt do not have to be shown beyond a reasonable doubt; that doctrine applies only to the

guilt or innocence of the defendant upon the whole case. (Ark.) *Butt v. State*, 42.

Attempt to Commit Crime.

3. **CRIME**.—To Constitute an Attempt to Commit a Crime, the act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent, and must reach far enough toward accomplishment of the desired result to amount to the commencement of the consummation. (Vt.) *State v. Hurley*, 934.

4. **CRIME**—Attempt to Commit—Jail-breaking.—If a prisoner in jail arranges for procuring saws adapted to jail-breaking, and thereby gets them into his possession with intent to break open the jail and escape, he is not guilty of an attempt to break jail. (Vt.) *State v. Hurley*, 934.

Accomplices.

5. **ACCOMPLICE**—Who is not.—Mere Silence in the presence of a crime, or mere failure to inform the officers of the law when one has learned of the commission of a crime, does not make one an accomplice. (Ark.) *Butt v. State*, 42.

6. **ACCOMPLICE**—Manner of Weighing Testimony.—To determine the truth or falsity of the testimony of accomplices, it should be weighed by the same rule by which the testimony of other witnesses is weighed; that is, by considering their connection with the crime and the defendant, their interest in the case, their appearance on the stand, and the reasonableness of their testimony, and its consistency with other facts proved in the case. (Ark.) *Butt v. State*, 42.

Evidence.

7. **CRIMINAL LAW**.—Mere Hearsay Evidence, subject to some exceptions, is never allowable, and the admission of it is presumed prejudicial. (Wis.) *Topolewski v. State*, 1019.

8. **CRIMINAL LAW**.—On the Trial of a Person for One Offense Evidence that he has committed other distinct offenses is incompetent and generally prejudicial. (Wis.) *Topolewski v. State*, 1019.

9. **CRIMINAL LAW**.—The Admission of Improper Evidence in a case tried to the court is regarded on appeal as harmless, unless it clearly appears that but therefor the finding would probably have been different. (Wis.) *Topolewski v. State*, 1019.

Evidence of Footprints and Trailing by Dogs.

10. **EVIDENCE OF FOOTPRINTS**.—Evidence that a person accused of arson made a peculiar footprint, identified as his in the soft ground on the morning following the burning of the house, being plain and distinct, and leading from the place where the house stood, and evidence that his shoes fitted the tracks, is competent to go to the jury. (N. C.) *State v. Hunter*, 830.

11. **EVIDENCE**—Trailing by Dog.—Evidence that a bloodhound, trained to track human beings and nothing else, and often used for that purpose, was put upon the tracks of the accused, and followed him until he was "treed," is competent to go to the jury in corroboration of evidence identifying footprints of the accused. (N. C.) *State v. Hunter*, 830.

Misconduct of Counsel.

12. **CRIMINAL TRIAL**.—Misconduct of Attorney.—A remark by the prosecuting attorney in his closing argument in a bribery prosecu-

tion, that "in his opinion the state has made the strongest case against Butt that it has made in any of the boodle cases," is not prejudicial if the court, on the making of an objection, instructs the jury to disregard it. (Ark.) *Butt v. State*, 42.

DEATH.

1. **WRONGFUL DEATH—Retrospective Statute.**—A statute giving a right of action for wrongful death to a person who in good faith sustained the marriage relation to the decedent, when there existed a legal impediment to their marriage, is unconstitutional in so far as it authorizes a woman to maintain an action for the death of a man which occurred prior to the enactment of the statute. (Mich.) *Philip v. Heraty*, 554.

2. **NEGLIGENCE CAUSING DEATH—Causes of Action for.**—If one statute provides that executors and administrators may commence and prosecute any personal action whatever which the testator or intestate might have commenced, except actions for slander, and another statute declares that whenever the death of a person shall be caused by a wrongful act, the person who would have been liable in an action therefor if death had not ensued shall be liable to an action for damages, to be brought in the name of the state for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, these statutes provide for two separate and distinct causes of action arising out of a death by the same wrongful act, and neither of such actions is a substitute for the other. Both may be maintained concurrently. Under the first-named statute, a cause of action survives which the deceased himself had, and his executor or administrator is entitled to recover damages which become an asset of his estate, while the other statute creates a new cause of action which the deceased never had, and the damages recovered therein are for the benefit of his family, and form no part of the assets of his estate. (Md.) *Stewart v. United Electric Light etc. Co.*, 410.

3. **NEGLIGENCE—Death by Wrongful Act.**—A natural mother cannot recover for the death of her natural child caused by wrongful act. (La.) *Lynch v. Knoop*, 391.

4. **MARRIAGE—Proof of—Legitimacy of Child.**—In an action to recover for the wrongful death of a child, where the defendant denies the legitimacy of such child and tenders an issue requiring proof of the marriage, the plaintiff must, in order to recover, produce evidence of her marriage. (La.) *Lynch v. Knoop*, 391.

5. **MARRIAGE—Proof of—Legitimacy of Child.**—Although the maternity of a child is recognized after its wrongful death, the child is not thereby legitimated so as to enable the mother to recover for such wrongful death without proof of her marriage, when such marriage and the legitimacy of the child are denied by the defendant. (La.) *Lynch v. Knoop*, 391.

6. **ADMINISTRATORS—Settlement by Heir for Wrongful Death of Intestate.**—A settlement made by a corporation with the sole heir of a person killed while in its employ is binding upon the administrator subsequently appointed, where the asset involved in the settlement is not needed for the payment of creditors or the expenses of administration, and if recovered by the administrator will go to the heir. (Wis.) *McKeigue v. Chicago etc. Ry. Co.*, 1038.

DEEDS.*In General.*

1. **DEED to Person Under Assumed Name.**—A conveyance to a person by a fictitious or assumed name passes the title. (Md.) *Hartman v. Thompson*, 422.

2. **DEED to Person Under Assumed Name.**—A grantee who directs a conveyance to be made to him under an assumed name, and who pays the agreed price, and subsequently accepts and holds the conveyance, practically entering into possession of the property, and expressly claiming title thereto, is bound by such deed. (Md.) *Hartman v. Thompson*, 422.

3. **DEEDS.**—Acknowledgment and Recording of a deed are sufficient to warrant a presumption of a legal delivery and acceptance thereof. (Md.) *Hartman v. Thompson*, 422.

4. **DEED—Repugnant Clauses.**—If the Granting Clause in a deed conveys the land in fee, a proviso in the habendum limiting the estate in certain contingencies to a life estate is repugnant to the granting clause and void. (Ark.) *Carl Lee v. Ellsberry*, 60.

Tender of Deed.

5. **DEEDS—Insufficient Tender of.**—A statement by an agent of the vendor made to the vendee that he has in his pocket a deed executed by the vendor, without producing it and giving the vendee an opportunity to examine it, is not a tender of the deed. (Pa.) *Lefferts v. Dolton*, 913.

6. **DEEDS.**—To Constitute a Valid Tender of a Deed requiring the vendee to pay the purchase money, a deed duly executed must be produced by the vendor to the vendee, so that the latter may see that it is regular in form, properly signed, sealed and acknowledged, and that it conveys the estate he bargained for. (Pa.) *Lefferts v. Dolton*, 913.

7. **DEEDS—Waiver of Tender of.**—If the tender of a deed from the vendor to the vendee is absolutely insufficient, the latter will not be deemed to have waived a valid tender, when he does not say that he will not accept a deed for the property, nor refuse in terms to pay the purchase money, nor say that he cannot make the payment thereof. (Pa.) *Lefferts v. Dolton*, 913.

Conditions Subsequent.

8. **CONDITIONS SUBSEQUENT—Remedy for Breach—Possession of Grantor.**—When courts of equity grant relief upon the principle of *quia timet*, thus preventing any vexatious or wrongful use of agreements which by construction are declared in fact conditions subsequent, and removing them as a cloud upon title, it is immaterial whether the plaintiff is in possession of the premises. (Wis.) *Mash v. Bloom*, 1028.

9. **CONDITION SUBSEQUENT—Aid of Equity to Effect Forfeiture.**—Where a grantee defaults in a condition subsequent of the conveyance, the grantor's claim to the right of possession and the grantee's denial of it operate as a re-entry, and vest title in the grantor, so that when the jurisdiction of equity is invoked the rule that equity does not lend its jurisdiction to effect a forfeiture is not violated. (Wis.) *Mash v. Bloom*, 1028.

10. **CONDITION SUBSEQUENT—Remedy for Breach.**—In case of a breach by the grantee of a condition subsequent for the support of the grantor, which condition is expressed in the deed, and therefore can be established without a resort to evidence aliunde, the

grantor cannot invoke the aid of a court of equity to enforce her rights, for she can obtain full relief in an action of ejectment wherein she can obtain a judgment declaring the conveyance forfeited, and awarding her possession. (Wis.) *Mash v. Bloom*, 1028.

11. **DEEDS—Conditions Subsequent—Forfeitures.**—While conditions subsequent in deeds, which result in a forfeiture upon failure to perform, are not favored, and are strictly construed, they must be upheld when clearly expressed, and not incapable or impossible of performance. (Minn.) *Minneapolis Threshing Machine Co. v. Hanson*, 623.

12. **DEEDS—Conditions Subsequent—Breach—Effect on Mortgage.**—If a grantee in a deed containing a condition subsequent mortgages the land, and the mortgagee takes the mortgage with full knowledge of such condition, he is not entitled to any relief upon the breach thereof. (Minn.) *Minneapolis Threshing Machine Co. v. Hanson*, 623.

Conveyance of Timber.

13. **DEEDS—Mortgage Back to Secure Purchase Money.**—If the owner of land conveys the timber thereon on condition that the deed shall be void unless the grantee pays a purchase money note at maturity and removes the timber within a specified time, the deed creates a relation in legal effect the same as in the case of conveyance of absolute title with a mortgage back to secure the purchase price. (Vt.) *Ordway v. Farrow*, 951.

14. **CONVEYANCE OF TIMBER—Condition Broken—Redemption Rights.**—If the owner of land conveys the timber thereon on condition that the deed shall be void unless the grantee pays a purchase money note at maturity and removes the timber within a specified time, and the grantee fails to pay the note at maturity, and before the expiration of the time for the removal of the timber the grantor sues the grantee in trespass for removing timber after the maturity of the note, and recovers judgment, such judgment and the contesting of the action do not bar the equitable right of the mortgagor to redeem. The equitable right to redeem could neither be heard nor determined in the action of trespass. (Vt.) *Ordway v. Farrow*, 951.

15. **CONVEYANCE OF TIMBER—Breach of Condition—Equitable Relief.**—If the owner of land conveys the timber thereon on condition that the deed shall be void, unless the grantee pays a purchase money note at maturity and removes the timber within a specified time, and he fails to pay such note, and upon a claim of forfeiture made by the grantor before the expiration of the time for the removal of the timber, the grantee tenders the amount of the note which is refused, and, in an action for trespass the grantor obtains judgment against the grantee, the grantor retaining possession, except to the extent necessary for the purposes of the conveyance, the grantee may maintain a suit to compel the grantor to accept the tender and for redemption, and in such case the grantor is in the position of a mortgagee holding adversely to the rights of the mortgagor, and though the time limit for the removal of the timber has expired the grantee is entitled to a reasonable time in which to remove it. (Vt.) *Ordway v. Farrow*, 951.

16. **STANDING TIMBER—Right to Remove—Forfeiture—Waiver.** An owner can sell standing timber only by a conveyance in writing under the provisions of the statute, but his right to forfeit the timber sold for nonremoval within the time fixed by the contract may be waived by parol. (Mich.) *Wallace v. Kelly*, 580.

17. STANDING TIMBER—Extension of Time to Remove—Forfeiture—Waiver.—An oral agreement to extend the time in which standing timber sold may be removed, in consideration that the purchaser pay the taxes thereon, is a waiver of the right to forfeit the timber for nonremoval within the time fixed by the contract of sale. (Mich.) *Wallace v. Kelly*, 580.

18. STANDING TIMBER—Right of Assignee of Purchaser to Remove—Forfeiture.—If the purchaser of standing timber has been given an extended period of time in which to remove it, his assignee will not be enjoined from cutting and removing it, on the ground that the time for its removal has expired. (Mich.) *Wallace v. Kelly*, 580.

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See Corporations, 7-11.

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DOGS.

See Criminal Law, 11.

DOWER.

DOWER.—A Husband cannot, by any act of his, prejudice his wife's right of dower. (Mich.) *Chase v. Angell*, 568.

EJECTMENT.

1. EJECTMENT.—Proof of Title in a Third Person will defeat an action of ejectment. (Ark.) *Wadly v. Leggitt*, 70.

2. EJECTMENT—After-acquired Title—Res Judicata.—The fact that a losing defendant in ejectment failed to plead or prove title in a third person as a defense does not bar him, after the rendition of judgment, from acquiring such title and bringing suit to test its validity. (Ark.) *Wadly v. Leggitt*, 70.

3. EQUITABLE RELIEF After Judgment at Law.—A defendant in ejectment is not always precluded from seeking relief in equity after judgment against him, on the ground that he has not filed a plea by way of equitable defense, as there are some cases in which the equitable rights of a defendant in ejectment can be determined only in a court of equity. (Md.) *Stump v. Warfield*, 434.

ELECTION OF REMEDIES.

ELECTION OF REMEDIES.—It is No Defense to an action by an infant client against his attorney for paying the infant's money to his parent, who had no authority to receive it, that the infant has previously prosecuted an unsuccessful action against the parent to recover the money. (Ark.) *Wood v. Claiborne*, 89.

ELECTRICITY.

NEGLIGENCE, Contributory, in Coming in Contact with an Electric Wire.—The mere fact that a boy, who was injured by coming in contact with an electric wire, must have reached up and struck it with his hand on a dark night is not sufficient to establish his contributory negligence as a matter of law. (Idaho) *Eaton v. City of Weiser*, 225.

See *Municipal Corporations*, 4-8.

EMINENT DOMAIN.*In General.*

1. EMINENT DOMAIN—Complaint, When Shows Necessity for Taking Land for a Reservoir for Accumulating Water to Float and Store Logs.—A complaint alleging that a river is narrow, not of uniform size during all seasons of the year, dependent on rain and snow, does not during certain portions of the year carry sufficient water to float logs except by the use of artificial means; that it is necessary to store water by the use of dams and other means; that such dams must be built at points rendered favorable to topography; that the dam was constructed for the purpose of storing waters and furnishing a storage basin for logs and improving the floating capacity and navigability of the river, is sufficient to show that the land sought to be taken will be used for the purpose of storing and floating logs on the river and improving its navigability, and sustains the exercise of the power of eminent domain. (Idaho) *Potlatch Lumber Co. v. Peterson*, 233.

2. EMINENT DOMAIN, Right of Extends to Streams Whether Navigable or not.—The right of eminent domain to be used to improve streams includes both the navigable and the unnavigable. (Idaho) *Potlatch Lumber Co. v. Peterson*, 233.

3. EMINENT DOMAIN, Nature and Extent of the Power of.—The power of eminent domain is an incident of sovereignty inherent in the federal government and in the several states. (Idaho) *Potlatch Lumber Co. v. Peterson*, 233.

4. EMINENT DOMAIN, Constitutional Grant of Right to Exercise the Power of.—The provision in regard to eminent domain and the taking of property for public use in the constitution of Idaho emanates directly from the people instead of the legislature, and is therefore legal and valid. (Idaho) *Potlatch Lumber Co. v. Peterson*, 233.

Public Use.

5. EMINENT DOMAIN—Public Use.—The Use of Lands for Storage Basins and the Improvement of the Floatability of Streams of Water, whether navigable or not, is a public use under a constitution declaring that the use of lands to a complete development of the material resources of the state is a public use. (Idaho) *Potlatch Lumber Co. v. Peterson*, 233.

6. EMINENT DOMAIN—Public Use, What is—Flexibility of the Term.—The term "public use" is flexible, and necessarily has been of constant growth as new public uses have developed. What is a public use will depend somewhat upon the nature and wants of the community for the time being. (Idaho) *Potlatch Lumber Co. v. Peterson*, 233.

Special Benefits.

7. EMINENT DOMAIN—Special Benefits.—The term "special benefits" as used in railway right of way condemnation proceedings

has the same meaning and is governed by the same rules as when employed in highway drainage or municipal improvement proceedings only in so far as private property is taken for a public use by such proceedings. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

8. EMINENT DOMAIN—Special Benefits—Setoff.—Special benefits may be set off in railway right of way condemnation proceedings against the value of the part taken, and damages to the remainder. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

9. EMINENT DOMAIN—Special Benefits—Setoff.—Special benefits to be set off in railway right of way condemnation proceedings must be pro tanto a fair equivalent for the land parted with and the damages inflicted. They must be special, not common; direct, not consequential; substantial, not speculative; proximate, not remote; actual, not constructive. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

10. EMINENT DOMAIN—Special Benefits.—The usual beneficial results to the public and to a railway company having the right to exercise the power of eminent domain arising from the construction and operation of the road are not special benefits. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

11. EMINENT DOMAIN—Special Benefits.—Increased Facilities for transportation of natural products at reasonable rates arising from the construction of a railroad are not special benefits or legal tender for parts of land of private owners taken under the power of eminent domain and for damages to the remainder. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

12. EMINENT DOMAIN—Special Benefits—Setoff.—Enhancement of the value of land arising from the construction of a railroad standing alone, is not a special benefit to it. A benefit is special, only when the road is so constructed as to give the land, a part of which is taken under the power of eminent domain, an increased value above the general appreciation of property in the neighborhood. Mere general appreciation, consequent on projected or actual construction of the road, cannot be set off against damages for the taking of the land. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

13. EMINENT DOMAIN—Special Benefits.—That "benefits to land," a part of which is taken for a railway under the power of eminent domain may be deducted, they must be special and local to the land, and such as result directly to the particular tract, a part of which is taken. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

14. EMINENT DOMAIN—Special Benefits.—The mere increase of transportation facilities and the prospective feasibility of connecting industrial works upon a tract of land, a part of which is taken by a railroad under the power of eminent domain for a right of way, are not ordinarily sufficient to constitute special benefits, at least where the land owner cannot by law compel the railroad company to furnish him with particular facilities. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

15. EMINENT DOMAIN—Special Benefits.—The probability that the railroad company will construct or maintain stub tracks, or permit switch connections whereby a land owner's quarries will make his land valuable, is not a special benefit to be set off against the value of the part of his land taken by the railroad company for a right of way under the power of eminent domain, or as against damages to the remainder. (Minn.) Mantorville Ry. etc. Co. v. Slingerland, 647.

ENTIRETIES.

See Husband and Wife, 2-6; Mechanic's Lien, 1, 2.

EQUITY.*Pleading and Practice.*

1. **EQUITY PRACTICE.**—Although the Specific Relief prayed for in a bill is denied, yet under the general prayer such relief should be granted as the complainant may be found entitled to under the allegations and proof. (Ill.) *Casstevens v. Casstevens*, 291.

2. **EQUITY PLEADING—Amendment and Answer.**—If the plaintiff, after demurrer to his whole bill has been sustained, is, by leave of court, allowed to file an amended bill, the defendant is entitled to answer anew, and to have his former answer dropped from the pleadings. (Vt.) *Scoville v. Brock*, 975.

3. **EQUITY PLEADING—Amendment of Bill and Answer—Admissions in Answer as Evidence.**—If a plaintiff, after demurrer to his whole bill has been sustained, has, by leave of court, filed an amended bill, and the defendant has answered anew, any admissions in defendant's original answer are provable like any other documentary admission not embraced in the record. (Vt.) *Scoville v. Brock*, 975.

Relief from Probate Orders.

4. **PROBATE ORDERS—Relief in Equity from Fraud.**—Equity has jurisdiction to set aside the orders of a probate court procured through the fraudulent suppression of the decedent's will. (Mich.) *Ewing v. Lamphere*, 563.

5. **PROBATE ORDERS—Suit in Equity to Vacate.**—The Verification of a Bill to set aside an order of a probate court by a less number than all of the complainants is sufficient. (Mich.) *Ewing v. Lamphere*, 563.

6. **PROBATE ORDERS—Laches in Seeking Equitable Relief.**—Where heirs procure an order of distribution by a fraudulent suppression of the decedent's will, and the legatees on discovering the will immediately petition for its probate, a suit in equity, commenced four years later while the probate proceedings are still pending, to vacate the order of distribution and protect the funds of the estate, is not barred by laches. (Mich.) *Ewing v. Lamphere*, 563.

7. **PROBATE ORDERS—Relief in Equity—Situs of Land.**—A suit in equity to set aside an order of distribution, protect the funds of the estate, and declare the persons holding it trustees, seeks relief against persons, not property, and hence the jurisdiction of the court is not affected by the fact that a part of the estate is outside the state. (Mich.) *Ewing v. Lamphere*, 563.

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ESCAPE.

See Criminal Law, 4.

ESTATES OF DECEDENTS.

See Executors and Administrators.

EVIDENCE.*In General.*

1. **EVIDENCE—Telephones, Conversations Over.**—A conversation by telephone between an agent of the plaintiff at its office with a person in the office of the defendant, purporting to speak for it, is admissible against the defendant, though there is no evidence that the person speaking over the telephone was authorized to use it or to speak for the defendant, and where the person so speaking calls for an ambulance to take persons to the plaintiff's hospital and says that the defendant will pay for their treatment and care, this also is admissible. (Conn.) *General Hospital Soc. v. New Haven Rendering Co.*, 173.

2. **EVIDENCE—Carbon Copies.**—Different impressions of a writing or contract produced by placing carbon paper between other sheets of paper and writing upon the outside sheet, so as to produce a fac-simile upon the one underneath, are duplicate originals, and either may be introduced in evidence without accounting for the non-production of the other. (Minn.) *International Harvester Co. v. Elfstrom*, 626.

3. **EVIDENCE, Presumption Against Error of Court in Admitting.** If evidence is admissible for one purpose but inadmissible for another, it will be presumed to have been admitted only for the legitimate purpose. (Conn.) *General Hospital Soc. v. New Haven Rendering Co.*, 173.

4. **EVIDENCE—Burden of Proof.**—The party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced. (N. C.) *Shepard v. Western Union Tel. Co.*, 796.

Parol to Vary Writing.

5. **EVIDENCE, Parol to Vary Writing—Third Parties.**—The rule that a written agreement cannot be varied by parol operates in favor of third persons as fully as in favor of the parties thereto. (Conn.) *Allen v. Ruland*, 146.

6. **EVIDENCE to Vary Written Contract.**—Testimony of a verbal conversation had before the execution of a written contract is not admissible to vary its terms. (Mich.) *Wallace v. Kelly*, 580.

Admissions and Declarations.

7. **EVIDENCE—Admissions and Declarations.**—If a son makes a common-law mortgage of chattels to his father and thereafter proceeds to obtain all the goods he can without paying for them, with intent to defraud his creditors, the mortgagor's statements showing such intent are inadmissible against the mortgagee, in the absence of evidence tending to connect him therewith. (Vt.) *Mower v. McCarthy*, 942.

8. **EVIDENCE—Mortgages—Declarations of Mortgagor.**—The mere relation of mortgagor and mortgagee, in the absence of evidence of collusion between them to defraud creditors of the former, does not create such a privity of estate as makes the declarations of one admissible against the other. (Vt.) *Mower v. McCarthy*, 942.

9. **EVIDENCE—Chattel Mortgages—Bankruptcy—Declarations Against Title.**—A bankrupt chattel mortgagor's declarations against his title to the property made while it was in his possession and

before his bankruptcy, are admissible in evidence against his trustee in bankruptcy. (Vt.) *Mower v. McCarthy*, 942.

10. **AGENCY**.—Declarations of an Agent made after the transaction to which his agency related is closed are not admissible in evidence. (Md.) *Hartman v. Thompson*, 422.

Representation as to Age.

11. **EVIDENCE**—Representation as to Age.—Representations of a person, since deceased, made ante litem motam respecting the date of his birth are admissible against his beneficiary in an action to recover insurance upon a benefit certificate issued to him in his lifetime. (Minn.) *Taylor v. Grand Lodge, A. O. U. W.*, 606.

12. **EVIDENCE**—Representation as to Age—Life Insurance.—A prior application for life insurance in another insurance company made under conditions of a nature to vouch for the truthfulness of the representations therein contained, in which the date of the birth of the insured is different from that given in the application for insurance involved in the present action, is competent evidence as tending to establish the true date of such birth. (Minn.) *Taylor v. Grand Lodge, A. O. U. W.*, 606.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS**.—An administrator cannot be permitted, by virtue of his trust, to take an advantage which he would not otherwise possess with reference to his own indebtedness to the estate. (Mass.) *Coffey v. Coffey*, 535.

2. **EXECUTORS AND ADMINISTRATORS**—Accounting by cannot be Affected by the Fact that a Fraud Redounded to the Benefit of a Person Interested in the Estate.—The fact that a son who, as agent of his mother, misappropriated rents collected by him, with the consent of his brother, then living, and applied them to the benefit of property owned by the two brothers, cannot prevent his being liable to account for such rents on his appointment as administrator of his mother's estate, though the persons to be benefited by such accounting are children of such brother, he and the mother having both died in the meantime. (Mass.) *Coffey v. Coffey*, 535.

3. **ADMINISTRATORS**—Title to Personal Property.—An executor or administrator is invested with the legal title to the personal property of the estate, but he holds that title charged with the duty of managing and disposing of the same in accordance with the provisions of the will or of the law. (Wis.) *McKeigue v. Chicago etc. Ry. Co.*, 1038.

4. **ADMINISTRATORS**—Relation of Trustee.—The duties of an executor or administrator are trust duties. In all essential respects he is regarded in courts of equity as a trustee. (Wis.) *McKeigue v. Chicago etc. Ry. Co.*, 1038.

5. **ADMINISTRATORS**—Heirs and Creditors as Beneficiaries.—In the administration of an intestate estate the beneficiaries of the trust are the creditors and the heirs. When the creditors are all paid, the heirs are the sole beneficiaries. (Wis.) *McKeigue v. Chicago etc. Ry. Co.*, 1038.

6. **EXECUTORS AND ADMINISTRATORS**.—A Foreign Executor may Sue in His Representative Capacity, without filing an exemplified copy of his testamentary letters, whenever the action arises out of a contract or transaction to which he is a party. (N. J. L.) *Morse v. King*, 702.

See Appeal and Error, 1, 2; Death, 6; Equity, 4-7.

EXEMPTIONS.

1. **EXEMPTIONS—Filing Schedule.**—Under no statute or law of Arkansas is property acquired since the filing of a schedule of exemptions relieved from seizure under any process before the filing of a schedule claiming the same as exempt. (Ark.) *Baxley v. Laster*, 64.

2. **EXEMPTIONS—Restraining Garnishment.**—The repeated prosecution of writs of garnishment to reach wages alleged to be exempt will not be enjoined on the ground that the purpose of the creditor is to annoy and harass the complainant and tie up his wages. His remedy, if any, is at law for a malicious abuse of process. (Ark.) *Baxley v. Laster*, 64.

EXTORTION.

See Criminal Law, 1; Trade Unions.

EXTRADITION.

1. **EXTRADITION, Release from Trial Because the Prisoner was not a Fugitive from Justice.**—If a prisoner has been brought within the jurisdiction of the demanding state, and is there applying to the court for relief, he cannot raise the question as to whether he was, as a matter of fact, a fugitive from the justice of the state. (Idaho) *In re Moyer*, 214.

2. **EXTRADITION.—The Question Whether or not a Citizen is a Fugitive from Justice** is one that can be available to him only so long as he is beyond the jurisdiction of the state whose laws he is alleged to have transgressed. (Idaho) *In re Moyer*, 214.

3. **EXTRADITION, Federal Courts, Right of, to Question, When Terminates.**—The question whether an alleged fugitive is such in fact ceases to be a federal question as soon as the prisoner invokes its aid within the state from which he is alleged to have fled. (Idaho) *In re Moyer*, 214.

4. **EXTRADITION, Acts of the Executive, in What Courts not Subject to Inquiry.**—The courts of the state demanding a prisoner have no jurisdiction to inquire into the acts of the executive delivering him. (Idaho) *In re Moyer*, 214.

5. **EXTRADITION, Surrender of Prisoner, Warrant and Acts Accompanying, When Become Functus Officio, and No Longer Subject to Inquiry.**—The warrant of the chief executive surrendering a prisoner, whether issued lawfully or unlawfully, has accomplished its purpose, and become functus officio as soon as he has been delivered to the demanding state, and its validity and the legality of its issuance cease to be questions open to the consideration of the courts of the demanding state. (Idaho) *In re Moyer*, 214.

6. **EXTRADITION.—The Act of a Governor of a State in Issuing His Warrant for the Arrest and Surrender of the Accused to the Agent of Another State** is at least quasi judicial, and amounts to a determination that the accused was substantially charged with the commission of a crime and was a fugitive from justice. (Idaho) *In re Moyer*, 214.

7. **EXTRADITION.—The Motives Which Prompted the Governor of a State to Issue His Warrant for the arrest of one accused** are not proper subjects of judicial inquiry. (Idaho) *In re Moyer*, 214.

8. **EXTRADITION.—Jurisdiction to Take the Action Complained of is the Test of the Validity of the Governor's Warrant for the**

surrender of an alleged fugitive, and the facts are subject to review by the federal courts and the courts of the surrendering state only where they are applied to before the state whose laws it is charged have been violated acquires jurisdiction of the person of the accused. (Idaho) In re Moyer, 214.

9. **EXTRADITION—Return of the Prisoner to the Surrendering State.**—There is no process or authority for the return of a prisoner to the state in which he was found and under the warrant of whose governor he was surrendered. (Idaho) In re Moyer, 214.

10. **EXTRADITION—No Vested Right of Asylum.**—One who commits a crime against the laws of a state, whether committed by him while in person on its soil or absent in a foreign jurisdiction and acting through some other agency, has no vested right of asylum in a sister state. The fact that a wrong is committed against him in the method pursued in subjecting his person to the jurisdiction of the complaining state, and that such wrong is redressible either in a civil or in a criminal action, constitute no reason why he himself should not answer the charge against him when brought before the proper tribunal. (Idaho) In re Moyer, 214.

11. **EXTRADITION, Gaining Advantage of the Accused, What is not.**—The mere apprehension of the accused, though in an unlawful manner, and subjecting him to the jurisdiction of the criminal courts of a state to answer a charge, does not amount to legal advantage any more than if he had voluntarily surrendered himself. The unlawful means employed in making his arrest are not chargeable to the sovereignty, and furnish no reason for discharging him when brought before the court. (Idaho) In re Moyer, 214.

12. **EXTRADITION—Person not Within the Demanding State at the Time of the Commission of the Offense.**—Where a person seeks relief by habeas corpus after being surrendered by the governor of another state on the charge of being a fugitive from justice of this state, he cannot obtain his release on the ground that he was without this state at the time of the commission of the alleged offense. (Idaho) In re Moyer, 214.

13. **EXTRADITION—Attack on by Habeas Corpus.**—Upon an application in habeas corpus for the release of one who has been surrendered by the governor of another state as a fugitive from justice, if the proceedings are regular on their face and the prisoner is held under process issued by a court of criminal jurisdiction, the writ must be quashed, and this without any inquiry respecting the legality of the proceedings in extradition by which he was brought within the jurisdiction of the courts of this state. (Idaho) In re Moyer, 214.

FALSE IMPRISONMENT.

1. **FALSE IMPRISONMENT.**—Although the persons causing the confinement of another intend to secure a legal restraint only, and do not intend to have him confined without a legal commitment, they are liable if he was so confined. (Conn.) Allen v. Ruland, 146.

2. **FALSE IMPRISONMENT—Essentials of Imprisonment.**—The essential thing to constitute an imprisonment is constraint of the person, which may be caused by threats as well as by actual force, and the threats may be by conduct or by words; and if they are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of his liberty as by prison bars. (N. J. L.) Hebrew v. Pulis, 716.

3. FALSE IMPRISONMENT—Apprehension of Use of Force.—In an action for false imprisonment, unless it is clear that there was no reasonable apprehension of force, it is a question for the jury whether the submission of the plaintiff to arrest was a voluntary act, or brought about by fear that force would be used. (N. J. L.) *Hebrew v. Pulis*, 716.

Nota.

False Imprisonment, color of legal or judicial proceeding is not essential to, 720.

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FOOTPRINTS.

See Criminal Law, 11.

FRAUDS, STATUTE OF.

1. CONTRACTS—Statute of Frauds—Collateral Agreement—Consideration.—If, at the time land is conveyed, as an inducement thereto and in part consideration for the sale and delivery of the deed, the grantee orally agrees that, if he does not build and resells the land, the grantor is to have the profits of such resale, such agreement is not without consideration, nor is it within the statute of frauds. (N. C.) *Bourne v. Sherrill*, 809.

2. CONTRACTS—Statute of Frauds.—A written contract between two persons concerning lands is, under the statute of frauds, not sufficient evidence of a contract between one of them and a third person not mentioned in the writing. (N. J. Eq.) *Clement v. Young-McShea etc. Co.*, 747.

3. STATUTE OF FRAUDS.—If One Conveys to Another Land or Other Property Pursuant to an Oral Agreement, which the other refuses, and cannot be compelled to perform because within the statute of frauds, the value of the property can be recovered by the party who so conveyed it. (Mass.) *Cromwell v. Norton*, 499.

4. STATUTE OF FRAUDS, Oral Evidence, Admissibility of Where Contract cannot be Enforced.—If one conveys property under and in pursuance of a contract not enforceable because not in writing, he may prove that fact by parol for the purpose of recovering the property so conveyed, where the grantee, relying upon the statute of frauds, refuses to perform the contract. (Mass.) *Cromwell v. Norton*, 499.

5. STATUTE OF FRAUDS, Limitation of Actions Brought Under a Contract not Enforceable Because of.—If one receives a conveyance

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of real property pursuant to an oral contract to reconvey it to the grantor, and such reconveyance being demanded, is refused, and the contract is nonenforceable because of the statute of frauds, and an action is then commenced to recover the value of the property, the statute of limitations as to such action does not commence to run until such demand and refusal. (Mass.) *Cromwell v. Norton*, 499.

6. STATUTE OF FRAUDS, Sale of Land, When does not Constitute Repudiation of an Agreement.—If a conveyance is made and received under an oral contract to reconvey to the grantor when requested, and the grantee sells part of the property, accounting to the grantor for the proceeds, this is not a repudiation of the agreement, and does not put the statute of limitations in motion against an action to recover the value of the remaining property on the grantee's refusing to convey it as agreed. (Mass.) *Cromwell v. Norton*, 499.

7. EVIDENCE that the Relations Between the Parties were Friendly and Kindly is not admissible in an action by a brother against his sister to recover the value of property which he claimed she had orally agreed to reconvey to him, she, on demand, having refused to make such conveyance, and taken advantage of the statute of frauds. (Mass.) *Cromwell v. Norton*, 499.

See Deeds, 13-18; Landlord and Tenant, 1-5.

GAMING.

GAMING.—Betting on Horseracing is not within a statute making it a crime to bet "on any game of hazard or skill." (Ark.) *State v. Vaughan*, 29.

See Contracts, 5; Nuisance.

GARNISHMENT.

1. GARNISHMENT—Contingent Rights.—One whose interest in an insurance policy depends on his survival of another has an interest the value of which can be ascertained by appraisal, or sale, or other means within the ordinary procedure of the court, and such interest is therefore subject to equitable trustee process under the statutes of Massachusetts. (Mass.) *Biggert v. Straub*, 449.

2. GARNISHMENT of Debt Due to a Nonresident.—The liability of a corporation upon a policy of life insurance issued by it, but held by a citizen and resident of another state, is subject to equitable process of garnishment in Massachusetts, which is the domicile of the corporation, so as to give the courts of that state jurisdiction to enter a decree against it. (Mass.) *Biggert v. Straub*, 449.

See Exemptions, 2.

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—Accounting—Suit to Set Aside Final Settlement.—In a suit to set aside a guardian's final account by which worthless securities were awarded to the ward, based on the fraud of the guardian, a finding that the guardian did not seek to deceive his ward, but gave him all the information he had regarding the securities, does not defeat the suit. The question in such case is not merely whether there was actual fraud or intentional wrong, but whether there was a failure to comply with the rules of law established for the protection of wards, the ward being entitled to

be informed, not only of the facts, but also of his rights with reference thereto. (Vt.) *Scoville v. Brock*, 975.

2. GUARDIAN AND WARD—Dealings Between.—A guardian cannot deal with his ward in his own interest without first placing the ward upon an equal footing with himself. (Vt.) *Scoville v. Brock*, 975.

3. GUARDIAN AND WARD.—Influence of a guardian over his ward is presumed to continue for a time after the guardianship has ceased. (Vt.) *Scoville v. Brock*, 975.

4. GUARDIAN AND WARD—Final Settlement—Duty of Guardian.—It is the duty of a guardian, before making final settlement with his ward, to inform him not only of all the facts in connection with the guardianship matters, but also of his legal rights with reference thereto, and the guardian cannot relieve himself of such duty by assuming that the probate judge will give the requisite instructions. (Vt.) *Scoville v. Brock*, 975.

5. GUARDIAN AND WARD—Limitations.—The statute of limitations does not begin to run against a ward so as to prevent him from setting aside a decree allowing the guardian's final account, based on the guardian's fraud, until the influence of the confidential relation has ceased. (Vt.) *Scoville v. Brock*, 975.

6. GUARDIAN AND WARD—Limitations, Fraud of Guardian.—The statute of limitations does not begin to run against a ward to prevent an action by him to set aside a decree settling his guardian's final account, obtained by fraud, until something occurs to raise a doubt of the honesty of the guardian; and if the ward does not know the law as to his rights until nearly eight years after he becomes of age, does not suspect any wrongdoing on the part of his guardian, and continues to have perfect confidence in his integrity, and a belief that he has acted honestly, properly, and legally as his guardian, the defense of the statute of limitations cannot avail the guardian. (Vt.) *Scoville v. Brock*, 975.

7. GUARDIAN AND WARD—Setting Aside Final Account.—A statute providing a remedy, after a guardian's discharge, for the correction of his account, relates to a further hearing in the probate court, and does not bar a ward from maintaining an action to set aside a decree allowing the guardian's final account based on fraud. (Vt.) *Scoville v. Brock*, 975.

8. GUARDIAN AND WARD—Liability of Guardian—Burden of Proof.—If a guardian is charged with negligence in the management of the funds of his ward, he cannot be held liable if such negligence did not occasion loss to the ward, or if such guardian exercised the requisite care and diligence in respect to investing the funds of the ward in his hands. The burden of proof as to this is upon the guardian. (Vt.) *Scoville v. Brock*, 975.

9. GUARDIAN AND WARD—Liability of Guardian.—If a probate court decrees to a ward stocks and bonds in a nonresident corporation, his guardian is not chargeable with negligence in taking such securities instead of demanding cash. (Vt.) *Scoville v. Brock*, 975.

See Infants, 2.

HIGHWAYS.

Removal of Railway Tracks.

1. HIGHWAYS—Bill to Remove Railway Tracks.—A township may maintain a bill in equity to compel the removal of railway tracks

laid in its highways without the consent of its authorities. (Mich.) Township of Bangor v. Bay City Traction etc. Co., 546.

2. HIGHWAYS—Estoppel to Remove Railway Tracks.—The acquiescence of the officers of a township in the unauthorized laying of railway tracks in its highways does not estop the township from maintaining a bill in equity to compel the removal of the tracks. (Mich.) Township of Bangor v. Bay City Traction etc. Co., 546.

Runaway Teams.

3. NEGLIGENCE—Liability for Injury from Runaway Horse.—It is negligence for the driver of a horse to leave him standing loose in a public street, and if such horse runs away, thereby inflicting an injury on a third person, who is without fault, the owner of the horse is liable therefor. (La.) Damonte v. Patton, 384.

4. NEGLIGENCE—Liability for Injury from Runaway Horse.—It is negligence for the driver of a horse and cart, the latter without lights, to leave such horse standing loose on the street on a dark night, and if the horse runs away and dashes into an electric car coming from an opposite direction, with the result that the motorman thereon is knocked off the car and injured, the owner of the horse is liable therefor, especially when it was impossible for the motorman to have seen the danger in time to avoid the accident. (La.) Damonte v. Patton, 384.

5. NEGLIGENCE—Injury from Runaway Horse—Contributory Negligence.—The motorman on an electric car is not guilty of contributory negligence in failing to anticipate such a danger as a collision with a runaway horse and wagon, without a driver and without lights, in the darkest hour of the night, rushing unexpectedly toward him, such runaway being caused by the negligence of the driver of such horse. (La.) Damonte v. Patton, 384.

Automobiles.

6. AUTOMOBILES, Liability of Owner for Injuries Inflicted by.—The Owner of an Automobile is not, Where the Person in Charge was not Using It in the Course of His Employment and in the owner's business, answerable for injuries inflicted by it on a person on the highway. (Pa.) Lotz v. Hanlon, 922.

7. AUTOMOBILES.—Evidence of the Ownership of an Automobile at the Time of an Accident does not establish the owner's liability. (Pa.) Lotz v. Hanlon, 922.

8. AUTOMOBILES, Liability of Owner for Accident, When not Shown.—Where a person is run down by an automobile in a frequented street of a city, the liability of the owner of the machine is not established by evidence showing his ownership of it, and that it was in charge of and managed by his regularly employed chauffeur, if it also appears that the latter was using his machine without his master's knowledge to entertain friends of such chauffeur, though he had it in his mind in the course of the drive to stop at a store where automobile supplies were sold to purchase some sparks for future use in connection with the machine. (Pa.) Lotz v. Hanlon, 922.

HOMESTEADS.

1. HOMESTEADS—Separate Parcels of Land.—If two parcels of land corner with each other, are connected by a road and occupied and cultivated as one farm, they may be selected and claimed as a homestead, when they do not exceed the legal area and value, although

the residence and necessary buildings are all located upon one of such parcels. (Minn.) *Brixius v. Reimringer*, 629.

2. **HOMESTEADS—Exemptions.**—A husband claiming a homestead exemption is not required as a condition precedent to show that his wife does not own property exceeding a certain amount in value. (La.) *Garner v. Freeman*, 361.

3. **HOMESTEAD.—Exemption Laws Must be Construed** with reference to the condition of things existing at the date of the seizure. (La.) *Garner v. Freeman*, 361.

4. **HOMESTEADS—Exemptions—Abandonment.**—If a homestead claimant, who is the head of a family, has not voluntarily abandoned his possession, his incarceration in the penitentiary does not deprive him of his right to claim the homestead as exempt. (La.) *Garner v. Freeman*, 361.

5. **HOMESTEADS—Exemptions—Head of Family.**—A homestead claimant, having a wife and three minor children, is entitled to a homestead exemption, although they are not living with him at the time of the seizure and some of them may have been earning their own support. (La.) *Garner v. Freeman*, 361.

6. **HOMESTEAD—Purpose of Exemption.**—The protection of the family from dependence and want is the object of the homestead law; apart from the family the debtor is entitled to no consideration. (Ark.) *Montgomery v. Dane*, 37.

7. **HOMESTEAD—Abandonment by Husband Alone.**—A husband cannot, by deserting his family and abandoning the homestead, let in the claims of his creditors against it, if the family desire to continue to reside thereon and preserve its homestead character, and he makes no attempt to furnish them another home. (Ark.) *Montgomery v. Dane*, 37.

HUSBAND AND WIFE.

Alienation of Affections.

1. **HUSBAND AND WIFE—Alienation of Affection—Defenses—Mitigation of Damages.**—In an action by a husband for the alienation of his wife's affections by seducing and committing adultery with her, evidence of the unhappy relations existing between husband and wife prior to such alienation, want of affection between them, and the husband's negligence or immorality, can only be shown in mitigation of damages, and not in bar of the action, unless plaintiff consented to the acts of the defendant. (Vt.) *Lewis v. Roby*, 984.

Tenancy by Entireties.

2. **TENANCY BY ENTIRETIES.**—The Common-law Doctrine of estates in entirety is the law of Missouri. (Mo.) *Frost v. Frost*, 689.

3. **TENANCY BY ENTIRETIES.**—Neither the Husband nor the Wife can so destroy the character of an estate held by them as tenants by entirety as to prevent the survivor from becoming the sole owner. (Mo.) *Frost v. Frost*, 689.

4. **TENANCY BY ENTIRETIES.**—The Married Women's Statutes, by dispelling the idea of the unity of husband and wife, do not abolish or alter the character of estates in entirety. (Mo.) *Frost v. Frost*, 689.

5. **TENANCY BY ENTIRETIES.**—The Title to Estates in entirety in Missouri is as it was at the common law; neither husband nor

wife has an interest in the property to the exclusion of the other; each owns the whole while both live, and at the death of either the other continues to own the whole freed from the claim of anyone claiming under or through the deceased. (Mo.) *Frost v. Frost*, 689.

6. ESTATE BY ENTIRETIES—Land Paid for in Part from Proceeds of Prior Estate.—Where a husband and wife sell land owned by them in entirety, and he uses the proceeds, together with his own money, to purchase other land in his own name, the court will decree that, to the extent the land is paid for from the proceeds of the prior sale, the title vests in them both as tenants by entireties, and that only the remainder vests in him alone. (Mo.) *Frost v. Frost*, 689.

See Principal and Agent, 4-7.

INFANTS.

1. INFANTS—Interest.—An Attorney Collecting Money for an infant client is not liable for interest thereon, if there is no person authorized to receive it during his minority, until he make demand after reaching his majority. (Ark.) *Wood v. Claiborne*, 89.

2. NEXT FRIEND—Authority to Receive Money for Infant.—Although anyone may bring suit as the next friend of an infant without giving bond, he is not authorized to receive the money upon the judgment recovered. (Ark.) *Wood v. Claiborne*, 89.

INJUNCTION.

1. INJUNCTION.—The Criminality of an Act sought to be enjoined neither gives nor ousts jurisdiction in chancery. (Ark.) *State v. Vaughan*, 29.

2. INJUNCTION—Injury to Business.—An injunction will lie to restrain a person from committing wrongful acts which tend to ruin complainant's business by bringing to bear upon his customers intimidating and coercive means. (Mich.) *Pratt Food Co. v. Bird*, 601.

3. INJUNCTION—Injury to Business.—An injunction will lie to restrain a state food commissioner from unlawfully placing in the hands of every dealer in the state a bulletin in effect threatening them with prosecution in case they make use of complainant's food products in the form in which they are lawfully sold to them. (Mich.) *Pratt Food Co v. Bird*, 601.

4. INJUNCTION—Enforcement of Void Ordinance.—If penal municipal ordinances injuriously affect existing property rights, their legality or constitutionality may be inquired into by a court of equity and their enforcement, in a proper case, enjoined. (La.) *New Orleans Baseball etc. Co. v. City of New Orleans*, 366.

5. INJUNCTION—Enforcement of Void Ordinance.—If property rights will be destroyed, unlawful interference by criminal proceedings under a void municipal ordinance may be reached and controlled by injunction by a court of equity. (La.) *New Orleans Baseball etc. Co. v. City of New Orleans*, 366.

6. INJUNCTION—Restraining Action at Law.—If the owner of land conveys the timber thereon on condition that the deed shall be void unless the grantee pays a note for the purchase price at maturity, and upon failure of the grantee to pay the note, the grantor obtains a judgment against him in trespass, but in a suit in equity

by the grantee, it appears that he is entitled to redeem, the conveyance constituting a mortgage, equity has jurisdiction to restrain any action under the judgment obtained in the action of the trespass. (Vt.) *Ordway v. Farrow*, 951.

See Exemptions; Mortgages, 3; Nuisance.

Note.

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INSTRUCTIONS.

See Trial.

INSURANCE.

Fire Insurance.

1. INSURANCE—Valued Policies, Construction of Statute Respecting.—A statute requiring every person insuring any building to have an examination thereof made and its value fixed by his agent, and providing that, in the absence of any change in the risk without the consent of the insurers and also of fraud on the part of the assured, the whole amount of the policy shall be paid in case of a total loss, refers only to a change in the condition of the property affecting its value, and does not prevent the operation of a condition of the policy making it void in the event of the property becoming vacant and unoccupied. (Ohio St.) *Germania Fire Ins. Co. v. Werner*, 891.

2. FIRE INSURANCE—Application as Part of Contract.—The statute of Wisconsin providing that all fire insurance corporations, except mutual companies in cities and villages, shall, upon issuing a policy, attach to it a copy of any application which by the terms of the policy is made a part thereof, does not except from its operation mutual companies organized outside the state, but only those organized under the laws of Wisconsin. (Wis.) *Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co.*, 998.

3. FIRE INSURANCE—Application as Part of Contract.—If an application for insurance addressed to a certain company contains a statement that a watchman is kept on the premises, but the agent splits up the insurance among the various companies which he repre-

sents, the application does not become a part of the contract between the insured and the companies to which it was not addressed. (Wis.) Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co., 998.

4. **FIRE INSURANCE—Nonoperation of Mill.**—A condition in a policy of insurance on a mill against any cessation of operation of the mill for ten consecutive days has no reference to such temporary cessations as occur in the usual course of business or arise from causes beyond the control of the insured. (Wis.) Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co., 998.

5. **FIRE INSURANCE—Nonoperation of Mill.**—A condition in a policy of insurance on a mill that the nonoperation thereof for ten consecutive days will avoid the policy is not violated by a cessation of operation for want of water-power in the winter, when the fact that the mill could not be operated in severe winter weather on account of a lack of water-power was an existing fact known to the insurer at the time of issuing the policy. (Wis.) Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co., 998.

6. **FIRE INSURANCE—Unconditional Ownership.**—A vendee in possession of premises under an executory contract of purchase has an interest of sufficient dignity to satisfy the calls of an insurance policy as to the interest of the insured being entire, unconditional, and sole ownership. (Wis.) Evans v. Crawford County etc. Ins. Co., 1009.

7. **FIRE INSURANCE—Right of Vendor to Proceeds.**—If the owner of insured property agrees to transfer it, but the transfer is not consummated until the buildings are destroyed by fire, he is entitled to recover on the policy of insurance. (Wis.) Evans v. Crawford County etc. Ins. Co., 1009.

8. **INSURANCE, Time of Loss, When Controls.**—The status of the insurer and the assured at the time of a fire must be reckoned with in working out their rights. (Ohio St.) Aetna Ins. Co. v. Stambaugh-Thompson Co., 834.

9. **INSURANCE, Cancellation of Policy, What Accomplishes.**—The surrender of a policy of insurance to a person whom the assured believes to be the agent of the insurer, though his agency has in fact terminated, and the acceptance of another policy in its stead, implies a request that the former policy be canceled, and amounts to a cancellation thereof. (Ohio St.) Aetna Ins. Co. v. Stambaugh-Thompson Co., 834.

10. **INSURANCE, Cancellation of Policy, When not Avoided by Its Return.**—If a policy is surrendered to a supposed agent of the insurer for the purpose of canceling it, his return of such policy at a later hour of the same day does not avoid the cancellation. (Ohio St.) Aetna Ins. Co. v. Stambaugh-Thompson Co., 834.

Proof of Loss.

11. **FIRE INSURANCE—Proof of Loss by Wife.**—When a husband is absent from home and cannot be informed of the destruction of his house by fire, his wife in charge of the property may make proof of loss by his implied authority as his agent *ex necessitate*. (Wis.) Evans v. Crawford County etc. Ins. Co., 1009.

12. **FIRE INSURANCE—Proof of Loss by Wife.**—False swearing by a wife in making proofs of loss as agent *ex necessitate* for her husband does not work a forfeiture of the insurance when not subsequently ratified by him. (Wis.) Evans v. Crawford County etc. Ins. Co., 1009.

Life and Accident Insurance.

13. **LIFE INSURANCE—Applicant for—Presumption.**—If the name and residence of an applicant for life insurance in two different companies and of the proposed beneficiary are the same in both applications, it must be presumed that the same person made both applications. (Minn.) *Taylor v. Grand Lodge A. O. U. W.*, 606.

14. **EVIDENCE—Life Insurance.**—Judicial Notice will be taken of the uniform and generally known custom of life insurance companies to require, as a condition precedent to the issuance of a policy, a formal written application duly signed by the applicant, together with a medical examiner's report disclosing minute information concerning the applicant's life and physical condition. (Minn.) *Taylor v. Grand Lodge A. O. U. W.*, 606.

15. **INSURANCE, ACCIDENT—Sunstroke.**—Insurance against loss of time due to "sunstroke" applies to and includes not only an effect produced by the heat of the sun, but the term, unexplained, includes and denotes a condition of disability produced upon the insured by any heat, solar or artificial, such as heat from a furnace, unless the context of the policy or other special considerations require a different meaning. (Kan.) *Continental Casualty Co. v. Johnson*, 308.

Title Insurance.

16. **INSURANCE.—One Already in Possession Claiming to be the Owner** when a policy of title insurance issues to him may recover thereon though he expends nothing and hence suffers no loss in reliance on the policy. (Pa.) *Foehrenbach v. German-American Title etc. Co.*, 916.

17. **A POLICY OF TITLE INSURANCE Means** the opinion of the company issuing it as to the validity of the title, backed by an agreement to make the title good in case it should prove to be mistaken, and loss should result in consequence to the assured. (Pa.) *Foehrenbach v. German-American Title etc. Co.*, 916.

18. **TITLE INSURANCE is Designed** to protect the insured, and save him harmless from any loss arising through defects, liens or encumbrances that may be in existence affecting the title when the policy is issued, but it does not protect against any claim arising after the issuance of the policy. (Pa.) *Foehrenbach v. German-American Title etc. Co.*, 916.

19. **TITLE INSURANCE—Liability for Partial Failure of.**—If a policy issues to one as an owner in severalty, who is afterward adjudged in a suit in partition to hold a moiety only, and he surrenders possession to a purchaser under the decree of sale entered in such suit, he is entitled to recover to the extent to which he is thus adjudged not to be the owner of the whole. (Pa.) *Foehrenbach v. German-American Title etc. Co.*, 916.

See Mortgage, 7.

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Insurance of Mortgaged Premises, agreement of the mortgagor to procure for the benefit of the mortgagee, effect of, 972.

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INTERURBAN RAILWAYS.

See Street Railways, 5, 6.

INTOXICATING LIQUORS.

LIQUOR—Place of Sale to Minor.—If B, a minor, gives money to A with which to purchase whisky for B, and the liquor is purchased and delivered according to their agreement, but every act in the transaction, except receiving the money from B and delivering the whisky to him, is done outside the state, A does not violate the statutes of the state forbidding the sale or gift of liquor to minors. (Ark.) *Anderson v. State*, 82.

JAIL-BREAKING.

See Criminal Law, 4.

JOINT TORT-FEASORS.

See Release; Torts.

JUDGMENTS.

Excess of Jurisdiction.

1. **JUDGMENTS in Excess of Jurisdiction—Attack upon.**—If a court exceeds its jurisdiction in rendering judgment, and such want of jurisdiction appears upon the face of the record, the judgment may be attacked either directly or collaterally at any time before or after the time for appeal, even by a person not a party to the action, but who is affected thereby in his property rights. (Minn.) *Sache v. Wallace*, 612.

2. **JUDGMENT Outside of Issues—Attack upon.**—If it affirmatively appears from the record that the court in rendering judgment went beyond and outside of the issues, and in the absence of one of

the parties determined property rights against him which he has not submitted to it, the court has exceeded its authority, even though it had jurisdiction of the general subject of the matters adjudicated. Such a departure is not a mere irregularity; it is extrajudicial, and renders the judgment absolutely void. (Minn.) *Sache v. Wallace*, 612.

3. **JUDGMENT—Extent of Relief.**—In an Action to Determine Adverse Claims to real property, plaintiff is entitled, on the default of the defendant, to such relief only as he demands in his complaint, or such as comes within the scope of its allegations, and a judgment beyond that is void. (Minn.) *Sache v. Wallace*, 612.

4. **JUDGMENTS — Validity—Jurisdiction.**—In addition to jurisdiction of the parties and of the subject matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the question which the judgment assumes to decide, or the particular remedy or relief which it assumes to grant. (Minn.) *Sache v. Wallace*, 612.

5. **JUDGMENT for Relief Beyond Issues** submitted is unauthorized and beyond the power of the court, and may be collaterally attacked at any time by a party in interest, whether a party to the suit or not. (Minn.) *Sache v. Wallace*, 612.

6. **JUDGMENT — Extent of Relief.**—A statute providing for a form of action to determine adverse rights in real property is not designed as a means of acquiring title, but as an expeditious mode of extinguishing claims of title held adversely to plaintiff, and a judgment in favor of plaintiff in such an action, based upon the usual form of complaint, does not of itself operate to transfer title from defendant. (Minn.) *Sache v. Wallace*, 612.

Equitable Relief.

See Equity, 4-7.

7. **JUDGMENTS — Equitable Relief.**—If by fraud and misconduct one has gained an unfair advantage in proceedings at law, whereby the court of law will be made an instrument of injustice, equity will interfere to prevent him from reaping the benefit of the advantage thus unfairly gained. (Vt.) *Scoville v. Brock*, 975.

8. **JUDGMENTS—Equitable Relief from.**—The rule that if one has gained an unfair advantage at law by reason of his fraud, equity will interfere to prevent him from taking advantage thereof, applies where a judgment at law obtained by fraud is relied upon as a defense. (Vt.) *Scoville v. Brock*, 975.

9. **JUDGMENTS—Equitable Relief from.**—Inability to vacate a probate decree allowing a guardian's final account will not prevent affirmative relief in equity, as the trustee may be held accountable, notwithstanding the decree for what is improperly retained. (Vt.) *Scoville v. Brock*, 975.

10. **JUDGMENT.**—Equity will not Restrain the Enforcement of a void judgment where the remedy at law is complete. And if the invalidity of a judgment of a justice's court appears upon its face, the remedy against it is complete by certiorari; while if its invalidity does not appear on its face, the justice who rendered it has power to correct it, and that remedy is plain. (Ark.) *Knight v. Creswell*, 74.

Res Judicata.

11. **JUDGMENTS—Res Judicata.**—A judgment against the general government in an action to cancel a patent to a railroad company does

not estop a homestead settler from pleading such settlement in defense to an action in ejectment brought against him by the railroad company's grantee. (Kan.) *Brandon v. Ard*, 321.

JUDICIAL SALE.

JUDICIAL SALE.—The Approval of a Judicial Sale by the chancellor will not be disturbed on appeal when no abuse of discretion appears. (Ark.) *Culver Lumber etc. Co. v. Culver*, 17.

JURISDICTION.

See Judgments, 1-6.

LABOR UNIONS.

See Trade Unions.

LANDLORD AND TENANT.

Lease by Agent—Statute of Frauds.

1. **LANDLORD AND TENANT—Lease by Agent—Statute of Frauds.**—A lease of land for more than three years, signed by an agent without written authority, has, as against his principal, no other effect than a lease at will, and is within the statute of frauds. (N. J. Eq.) *Clement v. Young-McShea etc. Co.*, 747.

2. **LANDLORD AND TENANT—Lease by Agent—Statute of Frauds.**—One accepting a lease of lands from an agent for a longer period than that permitted by the statute of frauds is bound to ascertain whether he has the requisite written authority to execute the lease. (N. J. Eq.) *Clement v. Young-McShea etc. Co.*, 747.

3. **LANDLORD AND TENANT—Lease by Agent—Effect on Principal—Want of Authority.**—If an agent executes a lease beyond the scope of his authority, the principal is not deemed to have ratified it, nor to be estopped from repudiating it, unless he has had actual or constructive notice of its terms. (N. J. Eq.) *Clement v. Young-McShea etc. Co.*, 747.

4. **LANDLORD AND TENANT—Lease by Agent—Effect on Principal—Ratification and Estoppel.**—If an agent executes a lease beyond the scope of his authority, the knowledge of his principal that the tenant is in possession and paying rent is not sufficient, as against the latter, to work either a ratification or an estoppel. The principal has a right to presume that the tenant is in possession under the authority actually vested in his agent. (N. J. Eq.) *Clement v. Young-McShea etc. Co.*, 747.

5. **LANDLORD AND TENANT—Lease by Agent—Effect on Principal—Ratification and Estoppel.**—If an agent executes a lease beyond the scope of his authority, ratification or estoppel will not be inferred against his principal from knowledge that the tenant is making trade improvements. The principal has the right to presume that his agent has acted within the scope of his authority in making the lease. (N. J. Eq.) *Clement v. Young-McShea etc. Co.*, 747.

Assignment of Leasehold.

6. **LANDLORD AND TENANT—Assignment of Leasehold.**—A holder of a leasehold interest in land may assign it to another for the express purpose of terminating his future liability for rent, pro-

vided the conveyance is designed by both parties to divest the estate of the grantor and vest it in the grantee. Such an assignment is not a fraud upon the owner of the reversion. (Md.) *Hartman v. Thompson*, 422.

7. LANDLORD AND TENANT—Assignment of Leasehold.—The only duty which the assignee of a leasehold estate owes to the reversioner is the payment of the stipulated rent accruing and the taxes becoming demandable, so long only as he continues to be the owner of the leasehold estate, and whenever he divests himself of this estate by a valid assignment to another, even though it be without a valuable consideration, the reversioner cannot complain. (Md.) *Hartman v. Thompson*, 422.

Condition of Premises.

8. LANDLORD AND TENANT, Duty of the Former as to Stairway Used in Common by Tenants.—With respect to the repair of a stairway over which the tenants have only a right of way in common and which is kept within the control of the landlord, he owes the duty of due care to keep it in the condition in which it was, or appeared to be, at the time of the letting, but he is not bound to change the mode of construction. (Mass.) *Andrews v. Williamson*, 452.

9. LANDLORD AND TENANT, Duty of the Former to Keep Up the Apparent Condition of the Property.—If, at the time of the letting of property to tenants, certain steps used by them in common and kept within the control of the landlord appear to be strong and sufficient, it is his duty to keep them in the condition in which they thus appear to be. (Mass.) *Andrews v. Williamson*, 452.

Note.

Landlord and Tenant, options to purchase demised premises contained in leases are enforceable, 598, 599.

options to purchase leased premises, assignment of, 600, 601.

LARCENY.

Consent of Owner.

1. LARCENY—Consent of Owner.—Where the owner of property, by himself or his agent, actually or constructively aids in the commission of an intended larceny, by performing or rendering unnecessary some act in the transaction essential to the offense, the would-be criminal is not guilty of all the elements of the crime. (Wis.) *Topolewski v. State*, 1019.

2. LARCENY—Consent of Owner—Absence of Trespass.—If one procures his property to be taken by another intending to commit larceny, or in practical effect delivers his property to such other, the latter purposing to commit such crime, the element of trespass is wanting and the crime is not fully consummated, however plain may be the guilty purpose of the one possessing himself of the property. (Wis.) *Topolewski v. State*, 1019.

Search of Prisoner.

3. ARREST—Right to Search Person.—An officer without a warrant for an arrest is not justified in compelling a person suspected of larceny to strip naked for the purpose of a search of her person. (N. J. L.) *Hebrew v. Pulis*, 716.

LEGACIES.

See Wills, 11-19.

LIFE TENANTS AND REMAINDERMEN.

1. LIFE TENANTS and Remaindermen, Interests of in Trust Funds.—Where funds of a specified value are subject to a trust in favor of life tenants and remaindermen, the former are not entitled to all that may have flowed from or accrued to the funds beyond their market value when received, and to have the existence and amount of the accretions determined upon the basis of such market value, when there have been changes in the form of the investment. (Conn.) Boardman v. Mansfield, 178.

2. LIFE TENANTS and Remaindermen, Interests of in Trust Funds, Restriction of the Former to the Income.—A will providing that a life tenant shall have the dividends, rents and profits of the trust funds gives no greater right than if it purported to bequeath the net income of such funds. (Conn.) Board v. Mansfield, 178.

3. LIFE TENANTS and Remaindermen—Trust Funds.—A life tenant is not entitled to profits resulting from the sale or increase in value of securities constituting part of the trust fund. (Conn.) Boardman v. Mansfield, 178.

4. LIFE TENANTS and Remaindermen—Interests of in a Trust Fund Consisting of Stock in a Corporation.—Until there has been some action by the corporation setting apart from the body of its assets some portion of them to become the property of stockholders, there is nothing in existence to which the rights of the latter can attach otherwise than as it attaches to the corporate interests as a whole—nothing which can be regarded as partaking of the nature of profits from the corporate investment. (Conn.) Boardman v. Mansfield, 178.

5. LIFE TENANTS and Remaindermen, Interests of, in Corporate Stock.—Where new stock is authorized and the right to subscribe therefor is accorded to the stockholders pro rata, whether the issue is based solely upon surplus assets, or upon such assets in part and in part upon payment by stockholders, or solely upon subscription payments, the stockholders get nothing which was not before a part of the corporate property, or the stockholder sells his right, and his assignee steps into his place. In either event, the life tenant acquires no interest in such added stock, nor in the moneys received for the privilege of subscribing for it. (Conn.) Boardman v. Mansfield, 178.

Note.

Life Tenants, dividends, cash, belong to, 167.

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income of trust funds belongs to, 162.

LIMITATION OF ACTIONS.

LIMITATION OF ACTIONS—Conflict of Laws.—A statute which provides that no action for personal injuries shall be maintained unless within one year a written notice containing certain prescribed statements shall be served on the person responsible for the injury, is a limitation statute admitting of no exception. It applies to both foreign and domestic causes of action, and acts like any statute of limitations, extinguishing the right in a domestic cause of action as to all jurisdictions, and extinguishing the right in

a foreign cause of action sought to be enforced in this state by a nonresident, so far as its enforcement in our courts is concerned. (Wis.) *Arp v. Allis-Chalmers Company*, 1036.

See Adverse Possession; Frauds, Statute of, 5.

MANDAMUS.

MANDAMUS, Questions Which may be Tried upon.—Upon an application for mandamus to compel the issuing of a permit to erect a building of a greater height than permitted by a statute, if it is constitutional, the court may dispose of the case on the merits by determining the constitutionality of the statute. (Mass.) *Welch v. Swasey*, 523.

MARRIAGE.

See Bastards; Breach of Promise; Death, 4-6; Husband and Wife.

MASTER AND SERVANT.

Relation of Master and Servant.

1. **EMPLOYMENT, Liability for Depriving Person of.**—One who by threats and intimidations injures an employé by causing him to be discharged from his employment is liable to an action therefor. (Conn.) *Wyeman v. Deady*, 152.

2. **MASTER AND SERVANT—Procuring Discharge of Employé.** Anyone intentionally and without legal justification procuring an employer to discharge his employé is liable to an action for damages at the suit of the latter, although there was no binding contract of employment. (N. J. L.) *Brennan v. United Hatters of N. A., Local No. 17*, 727.

Assumption of Risks.

3. **MASTER AND SERVANT.—The Doctrine of Assumed Risk** applies as well to those risks which arise or become known to the servant during the service as to those in contemplation at the time of the original hiring. (Ill.) *Illinois Central R. R. Co. v. Fitzpatrick*, 280.

4. **MASTER AND SERVANT.—The Rule of Assumption of Obvious Risks** does not rest wholly upon the contract of hiring, express or implied, but rather upon a waiver evidenced by the servant continuing in the employment with full knowledge of the danger. (Ill.) *Illinois Central R. R. Co. v. Fitzpatrick*, 280.

5. **MASTER AND SERVANT—Assumption of Risk—Gross Negligence of Master.**—Where a servant has knowledge of a danger in connection with the place of work or appliances in use, and voluntarily continues in the service without complaint and without any promise from the master to remedy the defect, he assumes the risk from such known defects and waives all claims to damages resulting therefrom; and it is immaterial that the defect exists as a result of gross negligence on the part of the master. (Ill.) *Illinois Central R. R. Co. v. Fitzpatrick*, 280.

Medical Treatment of Servant.

6. **MASTER AND SERVANT, Liability of the Former for the Care and Medical Treatment of the Latter.**—If, by an accident, employés of a corporation are injured and a message is sent by telephone from the office of the employer calling for an ambulance to take the injured persons to a hospital, and stating that the employer will be

answerable to the hospital for the care of such persons, and, the ambulance being sent, they are taken to the hospital and there cared for until discharged recovered, the jury, or the court sitting as such, is justified in finding that the employer is liable to the hospital for the care and treatment of such employes. (Conn.) *General Hospital Soc. v. New Haven Rendering Co.*, 173.

Torts of Servant.

7. **MASTER AND SERVANT**—Liability for Servant's Nonfeasance.—Where a servant negligently fails to do what he should have done, he is not liable therefor to third persons, but his master is. (Mo.) *McGinnis v. Chicago etc. Ry. Co.*, 661.

8. **MASTER AND SERVANT**—Liability for Servant's Misfeasance.—Where a servant negligently does what he should have properly done, both he and his master are liable therefor to third persons. (Mo.) *McGinnis v. Chicago etc. Ry. Co.*, 661.

9. **MASTER AND SERVANT**—Respondeat Superior—Exoneration of Servant.—A verdict which exonerates a servant in an action against him and his master for injuries caused by the servant's misfeasance should exonerate the master also. (Mo.) *McGinnis v. Chicago etc. Ry. Co.*, 661.

See Constitutional Law, 6, 7; Criminal Law, 1; Trade Unions.

MECHANIC'S LIEN.

1. **MECHANIC'S LIEN on Estate by Entireties**.—A mechanic's lien cannot be created against real estate held by husband and wife as tenants by the entireties, under a building contract signed by him alone. (Mich.) *Bauer v. Long*, 552.

2. **MECHANIC'S LIEN on Estate by Entireties**.—A statute providing for a lien upon a building erected on land, "to which the person contracting for such erection has no legal title," does not create a lien on a house erected upon land owned by husband and wife as tenants by the entireties, under a building contract not signed by her. (Mich.) *Bauer v. Long*, 552.

MINES.

See Tenancy in Common.

MONOPOLIES.

1. **RESTRAINT OF TRADE**—Combination and Conspiracy.—A complaint charging an unlawful conspiracy by certain dealers in drugs to exact and maintain a maximum schedule of prices for drugs and druggists' supplies, in restraint of trade, and that because plaintiff will not enter into such combination and conspiracy no drugs or supplies have been or will be sold to it by the defendants, and that no other dealer in such articles is, or will be, allowed to sell to it without incurring the penalty of being blacklisted and boycotted as threatened by the defendants, which action by defendants is not taken in the bona fide exercise of their right to sell or to refuse to sell to whom they please, but is taken with a malicious intent to injure and destroy the business of plaintiff, whereby it has been wholly deprived of the ability to purchase supplies, though ready to pay the prices asked, and as a result has been prevented from pursuing its lawful avocation, and has been injured in its business, states a good cause of action for the damages suffered. (Md.) *Klingel's Pharmacy v. Sharp*, 399.

2. RESTRAINT OF TRADE—Combinations.—If the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to an unlawful restraint of trade in such commodity, even though contracts to buy it at the enhanced price are constantly being made. Total suppression of the trade in the commodity is not necessary to render the combination one in restraint of trade. (Md.) *Klingel's Pharmacy v. Sharp*, 399.

3. RESTRAINT OF TRADE—Conspiracy.—A combination in restraint of trade is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief. (Md.) *Klingel's Pharmacy v. Sharp*, 399.

4. RESTRAINT OF TRADE—Conspiracy—Right of Action.—An action will lie for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business, resulting in damage. (Md.) *Klingel's Pharmacy v. Sharp*, 399.

MORTGAGES.

1. MORTGAGES—Assignment—Power of Sale.—If the assignee of a first mortgage is also the mortgagee in a second mortgage to secure the payment of the first and also additional money loaned by him, a sale by the attorney named in the second mortgage as agent to sell in case of default is not a foreclosure of the first mortgage, and passes only the interests bound by the second mortgage. (Md.) *Stump v. Warfield*, 434.

2. POWERS—Mortgages Under—Subrogation.—If there is a first mortgage, which is a valid execution of a power, and a second mortgage which is not a valid execution of such power, and conveys only the life interest of the donee in the power, and the purchaser, under foreclosure of the second mortgage, pays off the first mortgage, he may be subrogated to the rights of the first mortgagee, unless it is clearly established that the second mortgage was intended to convey the life estate alone, or that his right to subrogation is in some other way barred. (Md.) *Stump v. Warfield*, 434.

3. INJUNCTION Against Breach of Mortgage.—A mortgagee is not entitled to an injunction against the sale on the mortgaged premises of beer not manufactured by him, such sale being contrary to the terms of the mortgage, but not impairing his security. (Mich.) *Hardy v. Allegan County Judge*, 557.

4. MORTGAGES—Equitable Relief—Right of Redemption.—Although at law the legal estate becomes absolutely vested in the mortgagee upon default, in equity the mortgage is a mere security for the debt, and only a chattel interest and, until a decree of foreclosure, the mortgagor remains the real owner of the fee. The legal title vests in the mortgagee merely for the protection of his interest, and in order to give him the full benefit of the security, but for no other purpose, and after default the mortgagee has a right to redeem, which may be enforced in equity. (Vt.) *Ordway v. Farrow*, 951.

5. MORTGAGES.—If Payment, Satisfaction, or Settlement of a mortgage is not pleaded, neither can be proved under the general issue. (Kan.) *Bare v. Ford*, 336.

6. MORTGAGES—Tender—Interest.—If a mortgagor does not pay or tender the amount of the mortgage note on the day of its maturity, and the mortgagee thereafter refuses a proper tender, he is not entitled to interest after the tender is made. (Vt.) *Ordway v. Farrow*, 951.

7. MORTGAGES—Application of Insurance Proceeds.—A mortgagee receiving money on a fire insurance policy procured by the mortgagor for his benefit must, in the absence of any direction by the mortgagor, hold such money until some part of the mortgage debt or interest thereon is due, and thereafter apply it as fast as the debt falls due, and no faster. (Vt.) *Thorp v. Croto*, 961.

See Chattel Mortgage; Trusts.

Note.

Mortgage. See Insurance of Mortgaged Premises.

MUNICIPAL CORPORATIONS.

Ordinances.

1. MUNICIPAL CORPORATIONS—Notice to Precede Judicial Ordinances.—An ordinance, judicial in its nature, passed without notice to those property owners affected by its provisions, is invalid. (N. J. L.) *Sears v. Mayor and Council of Atlantic City*, 724.

2. MUNICIPAL CORPORATIONS—Ordinances—Three-fourths Vote.—If a city charter provides that the board of commissioners may create a debt, only after they have passed an ordinance by a three-fourths vote of the entire board, the words "entire board" mean all the members of the board in existence at the time that such ordinance is passed, and not all of those originally elected. (N. C.) *Commissioners v. Trust Co.*, 791.

Regulating Woodyards and Lumber-yards.

3. MUNICIPAL CORPORATIONS—Ordinance Relating to Lumber-yards and Woodyards—Uncertainty.—An ordinance relating to lumber-yards and woodyards and prohibiting the location and operation of a woodyard, "within one hundred and fifty feet of any inhabited portion of any residence district, without first securing the consent and permission of the common council so to do," is void for uncertainty and indefiniteness. (Minn.) *City of St. Paul v. Schleh*, 638.

Electric Plants and Wires.

4. MUNICIPAL CORPORATIONS—Streets—Improper Use of.—A municipal corporation has no right to erect an electric lighting plant within the limits of a public street, and such erection may be enjoined at the suit of abutting property owners. (Mich.) *McIlhinny v. Village of Trenton*, 583.

5. MUNICIPAL CORPORATIONS, When Engaged in Private Business so as to be Liable for Negligence of Its Officers.—A city engaged in the enterprise of manufacturing and selling electric light to its inhabitants is not engaged in a public, governmental duty, and is held to the same responsibility for injuries received on account of the negligent conduct of its officers as would a private individual running an opposition plant in the same municipality. (Idaho) *Eaton v. City of Weiser*, 225.

6. MUNICIPAL CORPORATION, Duty of in Maintaining Electric Wires.—As an owner and operator of an electric lighting system, it is the duty of a municipality to exercise the diligence and care commensurate with the dangers of the force it is handling, in order to

prevent injury to those engaged in their various pursuits and employments. (Idaho) *Eaton v. City of Weiser*, 225.

7. MUNICIPAL CORPORATIONS—Negligence in Maintaining a Live Electric Wire.—It is negligence in a municipal corporation maintaining an electric lighting plant and having notice of the condition of a wire to allow a live wire charged with a deadly current to remain suspended over a street and in such a manner that it is likely to come in contact with persons on horseback or in vehicles traveling along a thoroughfare. (Idaho) *Eaton v. City of Weiser*, 225.

8. MUNICIPAL CORPORATIONS, Effect of Notice to Officers of. The notice to a municipal corporation of the condition of an electric wire dangerous to life is inferable from notice thereof to its officers. (Idaho) *Eaton v. City of Weiser*, 225.

Paving and Grading Streets.

9. MUNICIPAL CORPORATIONS—Liability for Damages Due to Grading Streets.—A municipality is not liable to an abutting lot owner for consequential damages to his property on account of its raising or lowering the grade of the street from the natural surface to the grade established in the first instance, unless such change is unreasonable, or has been negligently made. (Colo.) *Leiper v. Denver*, 101.

10. MUNICIPAL CORPORATIONS—Judicial Ordinances, What are—Paving Streets.—An ordinance requiring the paving of a public street and imposing the burden of the cost thereof upon the real estate benefited thereby to the extent of the benefit received, is judicial in its nature. (N. J. L.) *Sears v. Mayor and Council of Atlantic City*, 724.

Defective Streets.

11. MUNICIPAL CORPORATIONS, Care Required of.—The duty which the law imposes upon a municipality is only to exercise ordinary care to see that the highway is safe for travelers. (Pa.) *Clifton v. Philadelphia*, 906.

12. MUNICIPAL CORPORATIONS—Rut in Street.—A city is not liable for personal injury received by a person in stepping into a rut in a soft dirt road while alighting from a street-car, when the rut is such as is ordinarily made by wagons, and is only a few inches deep. (Pa.) *Clifton v. Philadelphia*, 906.

13. MUNICIPAL CORPORATIONS—Defect in Street Negligence. If an accident happens by reason of some slight defect in a street, from which danger is not reasonably to be anticipated, the municipality is not chargeable with negligence. (Pa.) *Clifton v. Philadelphia*, 906.

Sewers—Nuisance.

14. MUNICIPAL CORPORATIONS—Nuisances, Liability for.—A city is liable for damages resulting from the maintaining of a nuisance through its failure to perform its duty to control and supervise its streets, and keep them open and in repair and free from nuisances. (Ohio St.) *City of Mansfield v. Bristol*, 852.

15. MUNICIPAL CORPORATIONS—Streets and Sewers.—The construction of a sewer in the streets is an authorized use thereof. (Ohio St.) *City of Mansfield v. Bristol*, 852.

16. MUNICIPAL CORPORATIONS—Streets—Power of to Grant Citizens the Right to Maintain Sewers Therein.—A municipal corporation, by virtue of its general control over public streets, may grant

permission to a lot owner to construct a private sewer therein, but cannot authorize him thereby to maintain a nuisance. (Ohio St.) *City of Mansfield v. Bristol*, 852.

17. MUNICIPAL CORPORATIONS—Nuisance, Liability for not Abating.—A municipal corporation is liable for damages in not abating a nuisance on land in its possession and under its control, and also where such nuisance consists of a private sewer maintained in one of its public streets by its permission. (Ohio St.) *City of Mansfield v. Bristol*, 852.

18. MUNICIPAL CORPORATIONS, Watercourse, When not Liable for Failure to Exercise Control Over.—A municipal corporation given by law control of a watercourse is not liable for not abating a nuisance therein. Whatever authority is given the city is merely a delegation of the police power, and for a failure to exercise that power a municipality is not answerable to a private action. (Ohio St.) *City of Mansfield v. Bristol*, 852.

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NAMES.

NAMES—Identity of Persons.—Identity of names *prima facie* establishes identity of persons. (Mich.) *Atwood v. Sault Ste. Marie Light etc. Co.*, 576.

See Contracts, 4; Deeds, 1.

NAVIGABLE WATERS.

WATERS, STREAMS, Navigability of cannot be Determined by the Legislature.—The declaration of a state legislature cannot impress upon a stream the character of navigability for logs, when the stream does not in fact carry water sufficient to float a single log. (Idaho) *Potlatch Lumber Co. v. Peterson*, 233.

NE EXEAT.

1. NE EXEAT.—While the Statutes of Wisconsin recognize the writ of *ne exeat*, and regulate the practice, its functions and the grounds upon which it issues must be determined by a reference to the common law. (Wis.) *Davidor v. Rosenberg*, 986.

2. NE EXEAT.—At the Common Law *Ne Exeat* was simply a writ to obtain equitable bail. (Wis.) *Davidor v. Rosenberg*, 986.

3. NE EXEAT—When and for and Against Whom to Issue.—At the Common Law the Writ of *ne exeat* issued by a court of equity on the application of the complainant against the defendant when it

appeared that there was a debt positively due, certain in amount or capable of being made certain, on an equitable demand not suable at law, save in cases of account and perhaps some other cases of concurrent jurisdiction, and that the defendant was about to depart from the realm under circumstances which would render a decree ineffectual. (Wis.) Davidor v. Rosenberg, 986.

4. **NE EXEAT is Issued Only Against a Debtor Who is a Party to the Suit.**—It does not issue against one who is not a debtor, whether he is a party to the suit or not. (Wis.) Davidor v. Rosenberg, 986.

5. **NE EXEAT does not Issue Against the Plaintiff in a suit on the application of a defendant who has interposed no counterclaim.** (Wis.) Davidor v. Rosenberg, 986.

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NEGLIGENCE.

Impute Negligence.

1. **NEGLIGENCE IMPUTABLE.**—The negligence of the driver of a vehicle is not to be imputed to a guest riding with him gratuitously and personally in the exercise of the care which ordinary caution requires. (Mass.) *Shultz v. Old Colony Street Ry. Co.*, 502.

2. **NEGLIGENCE OF DRIVER, When Precludes Recovery by a Person Riding with Him.**—If one riding as a guest is injured by the negligence of a third person and the negligence of the driver, there can be no recovery therefor by the guest, if, in the exercise of common prudence, he ought to have given some warning to the driver of carelessness on his part which the guest observed, or might have observed, in the exercise of due care for his own safety, nor if he negligently abandoned the exercise of his own faculties and trusted entirely to the vigilance and care of the driver. (Mass.) *Shultz v. Old Colony Street Ry. Co.*, 502.

Contributory Negligence.

3. **NEGLIGENCE, CONTRIBUTORY.**—Injury to Child.—The owner of lumber piled upon a river bank in the usual way is not liable, in the absence of negligence on his part, for an injury to a bright and intelligent child, eight years of age, who unnecessarily and without invitation exposes herself to accident by playing upon such lumber. (La.) *Lynch v. Knoop*, 391.

4. **NEGLIGENCE, CONTRIBUTORY.**—The Doctrine of "the Last Chance" is applicable only in exceptional cases, and the prevailing habit of incorporating it in almost every charge to a jury in negligence cases, in connection with, and even as a part of, instructions on the subject of contributory negligence, is misleading and dangerous. (Ohio St.) *Drown v. Northern Ohio Traction Co.*, 844.

5. **NEGLIGENCE, CONTRIBUTORY.**—The Last Chance Doctrine can be Applied Only where the negligence of the defendant is proximate and that of the plaintiff remote; for if the plaintiff and the defendant are both negligent, and their negligence is concurrent and directly contributes to produce the accident, then the case is one of contributory negligence, pure and simple; but if the plaintiff's negligence merely put him in a place of danger and stopped there, not actively continuing until the moment of the accident, and the plaintiff either knew of the danger, or by the exercise of such diligence as the law imposes upon him would have known of it, then if the plaintiff's negligence did not concurrently combine with the defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury, and that of the plaintiff is a remote cause. (Ohio St.) *Drown v. Northern Ohio Traction Co.*, 844.

See Death; Electricity; Highways.

Note.

Negligence. See Street Railways.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. APPELLATE PROCEDURE.—If the Amount Involved in an Error is Trifling Compared with the Whole Judgment, a new trial may be refused. (Conn.) *Barker v. Lewis Storage etc. Co.*, 141.

2. APPELLATE PROCEDURE.—The Decision of a Trial Judge Denying a New Trial will be sustained on appeal if it appears by the record that there was some evidence upon which the jury could reasonably have found the issue submitted to them in favor of the respondent, and could properly have awarded damages to the amount named in their verdict. (Conn.) *Wyeman v. Deady*, 152.

NEXT FRIEND.

See Infants, 2.

NUISANCES.

1. NUISANCE.—A Poolroom or Turf Exchange, maintained to facilitate betting on horseraces, is a common-law nuisance, whether or not such betting is prohibited by statute. (Ark.) *State v. Vaughan*, 29.

2. NUISANCE—Poolroom.—An Injunction will not lie at the instance of the state to restrain the maintenance of a poolroom which is a public nuisance, if it does not affect private property rights or public privileges. (Ark.) *State v. Vaughan*, 29.

3. NUISANCE, Joint Liability for, When does not Exist.—A riparian proprietor who has been injured by the pollution of a stream by the acts of several may not, in a suit against one, recover against him for the entire injury, excepting to the extent that the jury may mitigate the amount of recovery by considering the evidence tending to show the extent to which the acts of others have contributed. (Ohio St.) *City of Mansfield v. Bristol*, 852.

See Municipal Corporations, 14-18.

Note.

Nuisance, continuance of, liability for, 878.

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OFFICERS.

1. OFFICES—When Incompatible.—It is not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties, then the offices are incompatible. (Wis.) *State v. Jones*, 1042.

2. OFFICES—When Incompatible.—The Offices of County Judge and justice of the peace are incompatible, so that a county judge loses his right of office by qualifying as a justice of the peace and entering upon his duties as such. (Wis.) *State v. Jones*, 1042.

3. OFFICER—Liability for Acts of Appointee.—A chief of police is not liable for the acts of a dogcatcher whom he appoints, unless he fails to exercise reasonable care in the selection of the appointee. (Ark.) *Casey v. Scott*, 80.

OPTIONS.

See Specific Performance; Vendor and Vendee.

Note.

Options for the purchase of real property, acceptance of, what is sufficient, 597, 598.

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PARENT AND CHILD.

PARENT—Authority to Receive Money for Child.—A parent has no authority, as the natural guardian of his minor child before execution of a bond as guardian, to receive money due the infant. (Ark.) *Wood v. Claiborne*, 89.

See Adoption; Adverse Possession; Infants.

PARTITION.

1. PARTITION.—Equity has Jurisdiction to partition equitable, as well as legal, estates. (Mich.) *Chase v. Angell*, 568.

2. PARTITION BY AGREEMENT—Decision of Arbitrators.—Where the widow and heirs of a decedent agree in writing to leave the division of his estate to three persons whom they select, the decision of these three is binding upon the parties who sign the agreement, as a common-law submission to arbitration. (Ill.) *Casstevens v. Casstevens*, 291.

3. PARTITION BY AGREEMENT—Construction of Deeds—Evidence of Consideration.—When partition is made by mutual deeds, they should be read and construed in the light of the circumstances attending their execution, and it is competent to show that the only purpose of the parties was to accomplish partition, and that no other consideration passed between them. (Ill.) *Casstevens v. Casstevens*, 291.

4. PARTITION BY AGREEMENT—Insufficiency of Consideration.—The mutual agreement of cotenants to divide the common property is a sufficient consideration to support the division, if each takes the proportion to which he is entitled under the law; but it is not a sufficient consideration for a division of the estate of a deceased person between his widow and heirs which gives her a fee simple title to one-third of the land instead of a life estate in such third. (Ill.) *Casstevens v. Casstevens*, 291.

PARTNERSHIP.

1. PARTNERSHIP IN LANDS—Part Performance—Land as Assets—Statute of Frauds.—If a parol partnership to plat, improve, and sell lots from a tract of land owned by one of the partners has been partly performed by entering upon the business of the partnership, each partner doing work, putting in funds, and incurring joint indebtedness in the firm name while improving the premises, the statute of frauds is not an insuperable objection to treating the lands as a part of the assets of the partnership. (Mich.) *Chase v. Angell*, 568.

2. PARTNERSHIP IN LANDS—Accounting.—If, upon an accounting between partners in a land partnership, it appears that they orally agreed that a certain lot might be withdrawn from the partnership control upon fair terms, never in fact agreed upon, equity requires that the arrangement be carried out, upon a reasonable division of values, as they then existed. (Mich.) *Chase v. Angell*, 568.

3. PARTNERSHIP IN LANDS—Dower Right.—If, prior to the time that the parties to a parol partnership to plat and sell land owned by one of them entered upon the performance of the agreement, necessary to take it out of the statute of frauds, the partner owning the land acquired a domicile within the state, his wife has

an inchoate right of dower in the lands. (Mich.) Chase v. Angell, 568.

4. **PARTNERSHIP—Lands as Assets.**—Land owned by copartners as part of the firm's assets, where each has a legal title, is held in common, subject to a liability to have it applied to partnership obligations and accounting, each having a lien on the interest of his copartner for any balance due him. (Mich.) Chase v. Angell, 568.

5. **PARTNERSHIP—Dissolution—Lands—Partition.**—If a partnership is dissolved, or can no longer continue business, real estate constituting part of its assets may be divided by compulsory partition, if it be shown that it will not be required to satisfy liabilities of the firm. (Mich.) Chase v. Angell, 568.

6. **PARTNERSHIP—Lands as Trust.**—A partner holding the legal title to land constituting part of the assets of the firm holds it in trust, for the uses thereof, its creditors, and his copartner, and equity will compel such conveyance as the necessities of the business and the rights of the copartner require. (Mich.) Chase v. Angell, 568.

7. **PARTNERSHIP—Lands—Dower—Dissolution.**—If, on the dissolution of a partnership, it appears that land constituting part of the firm's assets is subject to a prior right of dower in the wife of the partner holding the legal title, the court in partition proceedings will determine the value of the dower interest, and pay or secure it to the person entitled to it. (Mich.) Chase v. Angell, 568.

PARTY-WALLS.

1. **CONSTITUTIONAL LAW—Party-walls.**—The legislature has a constitutional right to confer upon municipalities the power of regulating party-walls. (Pa.) Heron v. Houston, 898.

2. **PARTY-WALLS—Statutory Right to Erect.**—Every owner of a lot of ground in a city has statutory right to make a party-wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken from him by the adjoining owner, building exclusively upon his own land, either to the line or a short distance therefrom. (Pa.) Heron v. Houston, 898.

PLEADING.

DEMURRER.—By Answering Over After the Overruling of his demurrer the defendant waives the question raised by it. (Mo.) Brannock v. St. Louis etc. R. Co., 695.

See Actions; Equity.

POLICE POWER.

See Constitutional Law, 11, 12.

POOLROOM.

See Nuisance.

PRINCIPAL AND AGENT.

In General.

1. **AGENCY, REVOCATION OF, Notice of, When Essential.**—If the authority of an insurance agent is revoked, notice of such revo-

cation should be given to persons who have dealt with him as such agent. Otherwise, as to them, he will be deemed to have authority to represent his former principal and to bind it by contracts of insurance which he had authority to make before such revocation. (Ohio St.) Aetna Insurance Co. v. Stambaugh-Thompson Co., 834.

2. RATIFICATION OF UNAUTHORIZED ACTS, Retrospective Effect of.—If an act is done and a contract made by a person acting as an agent, but without authority to do so, and such contract or act is ratified by the principal, the other party to the contract may rely thereon as against third persons as making the contract valid from the beginning. (Ohio St.) Aetna Ins. Co. v. Stambaugh-Thompson Co., 834.

3. AGENCY, Transaction by Person Representing Two Adverse Parties.—If a person claiming to be the agent of an insurer obtains the surrender of a policy and the issuing of another in place thereof by another insurer of whom he is also the agent, the latter cannot avoid its policy on the ground that its agent, in what he did in procuring the surrender of one policy and the issuing of another, acted as an agent of both parties. (Ohio St.) Aetna Ins. Co. v. Stambaugh-Thompson Co., 834.

Agency between Husband and Wife.

4. AGENCY of Husband for His Wife is no more extensive in scope or longer in duration than that of any other agent similarly constituted. (Md.) Hartman v. Thompson, 422.

5. HUSBAND AND WIFE—Wife as Agent of Husband.—If a husband absents himself from home and keeps his whereabouts unknown, his wife becomes his agent by implication of law to do those things customarily delegated by husbands to their wives under similar circumstances. Beyond this she cannot bind him as agent ex necessitate, regardless of whether her attempt to do so is judicious from a business standpoint. (Wis.) Evans v. Crawford County etc. Ins. Co., 1009.

6. HUSBAND AND WIFE.—The Authority of a Wife as Agent for her husband by implication of law during his absence does not extend to transferring his real estate. (Wis.) Evans v. Crawford County etc. Ins. Co., 1009.

7. HUSBAND AND WIFE—Wife as Agent—Ratification by Husband.—When a wife, assuming to act for her husband but without authority so to do, contracts for her own benefit rather than for his, ratification by him does not spring from neglect to disavow, but from some affirmative recognition of her act as having been done by authority. (Wis.) Evans v. Crawford County etc. Ins. Co., 1009.

Notice to Agent.

8. AGENCY.—Knowledge of an Agent that he has overstepped the bounds of his authority cannot be imputed to his principal. (N. J. Eq.) Clement v. Young-McShea etc. Co., 747.

9. AGENCY.—Knowledge Possessed by One Person cannot be ascribed to another, unless there exists between them a relation of agency, in the exercise of which such knowledge would be useful and pertinent. (N. J. Eq.) Clement v. Young-McShea etc. Co., 747.

See Evidence, 10.

PROBATE ORDERS.

See Equity, 4-7.

PROBATE PROCEEDINGS.

See Executors and Administrators; Wills.

PROCESS.

See Corporations, 14, 15.

PUBLIC LANDS.

1. PUBLIC LANDS—Grants and Reservations—Withdrawal from Settlement.—If a grant to a railway company expressly reserves from its operation all lands to which the right of pre-emption or homestead settlement has attached when the line is definitely fixed, the United States land commissioner, in the absence of express authority, and prior to the definite location of the line, has no power to issue an order withdrawing any of such lands from pre-emption or homestead settlement. (Kan.) *Brandon v. Ard*, 321.

2. PUBLIC LANDS—Grants and Reservations—Authority of Land Commissioner.—If public lands are granted to a railroad, with certain reservations for purposes designated in the grant, in the absence of express authority the Secretary of the Interior or land commissioner is powerless to make any order with reference thereto which will have the effect to defeat such reservations. (Kan.) *Brandon v. Ard*, 321.

PURE FOOD LAWS.

See Adulteration.

QUIETING TITLE.

1. CONSTITUTIONAL LAW—Quieting Title—Jury Trial.—Under a statute providing that a person in possession may bring and maintain a suit in chancery to settle the title to land, and that "upon the application of either party an issue of law shall be directed to try the validity of such claim, or to settle the facts, and the court of chancery shall be bound by the result of such issue, but may for sufficient reasons order a new trial thereof, according to the practice in such cases," the intention of the legislature was that an issue at law should be awarded, and not an action at law directed, and that the suit should be purely equitable, the defendant therein not being entitled as a constitutional right to a trial by jury in an action at law, as distinguished from a trial of the issue at law as directed by the court of chancery. (N. J. Eq.) *Brady v. Carteret Realty Co.*, 778.

2. CLOUD ON TITLE.—One having an Equitable Fee may maintain a bill to set aside a cloud on title. (Ill.) *Casstevens v. Casstevens*, 291.

3. CLOUD ON TITLE.—The Decree in a Suit to quiet title should not require the defendant to convey the land to the complainant. (Ill.) *Casstevens v. Casstevens*, 291.

4. AN ACTION to Determine Conflicting Claims of Title may be Sustained by a Plaintiff Holding an Equitable Title Only, and against a defendant holding the legal title only, under a statute declaring that an action may be brought by any person against another who claims an estate or interest adverse to him and for the purpose of determining such adverse claim. (Idaho) *Coleman v. Jagers*, 207.

5. BEFORE PROCEDURE—Equitable Title—Abolition of Distinction Between Law and Equity.—The provision of the constitution of Idaho declaring that the distinction between actions at law and suits in equity, and the forms of all such actions and suits are prohibited, and that we have but one form of action for the enforcement or protection of private rights, or the redress of private wrongs, and the statutes enacted thereunder enable any person, whether in or out of possession, and holding the legal or equitable title, to maintain an action against another who claims an estate in real property adverse to him, to have such adverse claim determined and settled. (Idaho) *Coleman v. Jaggers*, 207.

See *Waters and Watercourses*, 25, 26.

RAILROADS.

Persons Entering Cars to Make Purchases.

1. RAILROADS—Licensees—Persons Entering Cars to Make Purchases.—A railroad company carrying on its cars venders of fruit, confectioneries, or newspapers for sale to its passengers, does not invite or induce the public to enter into them at stations for the purpose of making purchases, and a person who is in the habit of entering the cars for that purpose without objection, inducement or invitation on the part of the company or its employé, is a mere permissive license. (N. C.) *Peterson v. South and Western Ry. Co.*, 799.

2. RAILWAYS.—Persons Entering a Car to Purchase Fruit or Other Things Sold Thereon, Assume the Risk, and cannot recover in the absence of wanton injury. Hence, they cannot recover for injury due to a sudden starting of the train. (N. C.) *Peterson v. South and Western Ry. Co.*, 799.

Care at Crossings.

3. RAILROADS—Negligence—Grade Crossing.—It is the duty of employés of a train approaching a crossing to give such signal as will protect the traveler on the highway if he is in the exercise of ordinary care, and it is not a conclusive answer for the railroad company to say that the bell was rung or the whistle sounded in reply to a charge that a train negligently approached a grade crossing, unless it appears that under the circumstances of the case, such signal was sufficient to give timely notice to travelers who were approaching the crossing on the highway. (Pa.) *Bickel v. Pennsylvania R. R. Co.*, 926.

4. RAILROADS—Negligence—Grade Crossings.—At a grade crossing on a railroad, the duties of the company and of the traveler on the highway are reciprocal, and each must approach the crossing with a due regard for the rights of the other, and when either fails to observe the care required, it is negligence for which the guilty party is responsible. Either party will be absolved from the charge of negligence only when he has done what the circumstances of that particular case required a prudent man to do. (Pa.) *Bickel v. Pennsylvania R. R. Co.*, 926.

5. RAILROADS—Negligence—Grade Crossings.—In determining the duty of a person approaching a grade railroad crossing with restive and skittish horses, regard must be had, not only to his conduct under the circumstances, but also that of the railroad company, as to whether or not it gave the proper danger signals. (Pa.) *Bickel v. Pennsylvania R. R. Co.*, 926.

6. RAILROADS—Crossings—Duty to Stop, Look and Listen—Presumption.—It is the duty of the driver of a team on a highway

to stop, look and listen for an approaching train, at a proper place before reaching a grade crossing, and to continue to observe due care to prevent a collision until he has passed entirely beyond the track, but he is presumed to have performed this duty. (Pa.) *Bickel v. Pennsylvania R. R. Co.*, 926.

See Carriers; Street Railways; Constitutional Law, 4; Highways, 1, 2.

RECEIVERS.

1. CORPORATIONS—Receiver, When may be Appointed for.—On a complaint by stockholders in a corporation showing that the president and directors in charge thereof are incompetent to manage its business, and have entered into a conspiracy to loot it of its profits, and are mismanaging it, and running it into indebtedness and insolvency, a receiver should be appointed. (Idaho) *Hall v. Nieukirk*, 188.

2. CORPORATIONS—Receivers.—A Court Has Jurisdiction to Appoint a Receiver of a Corporation pendente lite. (Idaho) *Hall v. Nieukirk*, 188.

3. CORPORATION—Grounds for Receivership.—When the officers of a foreign corporation are recklessly and extravagantly managing its affairs, involving it in debt, and converting its property to their own use, and the board of directors, though requested, refuse to interfere, the interposition of a court of equity and the appointment of a receiver are proper. (Ark.) *Culver Lumber Co. v. Culver*, 17.

4. CORPORATION—Mismanagement.—Courts of Equity have no authority to dissolve a foreign corporation or wind up its business, but they may, in case of mismanagement in its affairs, take charge of its property within their jurisdiction and enforce the rights of creditors and stockholders in respect thereto. (Ark.) *Culver Lumber etc. Co. v. Culver*, 17.

5. CORPORATION—Receivership Proceedings—Nonsuit.—After a receiver for a corporation has been appointed, creditors have intervened, and proved their claims, and the corporate property has been sold, the court will not permit the plaintiff to take a nonsuit, and will deny a motion to discharge the receiver. (Ark.) *Culver Lumber etc. Co. v. Culver*, 17.

Note.

Receivers. See Corporations.

RELEASE.

1. A RELEASE of One of Several Joint Tort-feasors for a valuable consideration is a release of all. (Conn.) *Allen v. Ruland*, 146.

2. RELEASE, Evidence of.—If several persons are joint tort-feasors, and one of them pleads that the plaintiff has released the others, several different releases executed at different dates and differing as to the names of the persons released are all admissible in support of the plea. (Conn.) *Allen v. Ruland*, 146.

3. RELEASE.—Extrinsic Evidence is not Admissible to Control the Effect of a Written Release and make it different from what it appears to be on its face. (Conn.) *Allen v. Ruland*, 146.

4. RELEASE, General, Admissibility of.—The fact that the release offered in evidence was general, extending to all demands and not particularly describing the demand in question, does not affect its admissibility. (Conn.) *Allen v. Ruland*, 146.

5. RELEASE AND RECEIPT, Difference Between.—A receipt is evidence that an obligation has been discharged, but a release is a discharge of it. (Conn.) *Allen v. Ruland*, 146.

6. RELEASE.—The Amount of the Consideration Given for a Release is not material if it was accepted and regarded as sufficient by the person executing the release. (Conn.) *Allen v. Ruland*, 146.

RELIGIOUS SOCIETY.

1. RELIGIOUS SOCIETY.—To Constitute a Religious Society, there must be a membership of persons associated together, which collectively constitutes the society, with such officers as are required, or at least a definite collective body acting as a society. (Ill.) *Miller v. Riddle*, 261.

2. RELIGIOUS SOCIETY—Dissolution by Abandonment.—If a religious society has no pastor for fifteen years, and during that time has no meeting or religious service of any sort, an inference of abandonment follows from the absence of a collective body associated together, and the association should be regarded as dissolved and out of existence. (Ill.) *Miller v. Riddle*, 261.

3. RELIGIOUS SOCIETY.—Dissolution by Abandonment—Reversion of Funds to Heirs.—Where a religious society which was the beneficiary of a testamentary trust fund is dissolved by reason of an abandonment of its purposes and functions for many years, such funds revert to the heirs of the testatrix; and the action of several persons who had been members of the society, after a bill has been filed by the heirs to construe the will and determine the ownership of the funds, in electing three trustees is insufficient to recreate the former organization or reinvest it with the right to the property. (Ill.) *Miller v. Riddle*, 261.

REMAINDERMEN.

See Life Tenants.

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REPLEVIN.

REPLEVIN.—There must be Possession, actual or constructive, in the defendant in order to sustain replevin. (Ark.) *Casey v. Scott*, 80.

RES JUDICATA.

See Judgments, 11.

RESTRAINT OF TRADE.

See Monopolies.

RUNAWAY TEAMS.

See Highways, 3-5.

SEARCHES AND SEIZURES.

See Larceny, 3.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE—When Matter of Course.**—When a contract is in writing, certain in its terms, based upon a valuable consideration, fair and just in all its provisions, and capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award damages for its breach. (Ill.) *Marshall v. Keach*, 247.

2. **SPECIFIC PERFORMANCE—Waiver of Defenses.**—During the pendency of negotiations for carrying out a contract to exchange properties, a party may waive such defenses as want of mutuality and time as the essence of. (Ill.) *Marshall v. Keach*, 247.

3. **SPECIFIC PERFORMANCE OF OPTION to Sell Land.**—An option contract to sell land will be specifically enforced where the option holder, relying upon the option, has found a purchaser and made a contract to convey the premises to him, and will be liable to him in damages if he fails to perform his contract. In such case an action at law for the breach of the option to sell is not an adequate remedy. (Mich.) *Mier v. Hadden*, 586.

4. **SPECIFIC PERFORMANCE OF OPTIONS.**—Options for the purchase of land, when based on a valid consideration, are valid and may be specifically enforced. (Mich.) *Mier v. Hadden*, 586.

5. **SPECIFIC PERFORMANCE OF OPTIONS—Mutuality of Remedy.**—A purchaser's right to specific performance of an option for the purchase of land is not affected by the fact that he has, and the vendor has not, a choice of an action at law, or a suit for specific performance by the express terms of the contract, and the latter's damages are stipulated, while those of the former are not. (Mich.) *Mier v. Hadden*, 586.

6. **SPECIFIC PERFORMANCE OF OPTION—Offer to Perform.**—A bill for the specific performance of an option to purchase land sufficiently alleges performance on the part of the option-holder, when it shows a written acceptance of the option, a demand for an abstract as provided for in the contract, a refusal by the vendor to perform, an offer to pay the price, and to bring into court the amount thereof to be paid on the delivery of a deed. (Mich.) *Mier v. Haddon*, 586.

7. **SPECIFIC PERFORMANCE of the Conveyance of Land** will not be decreed unless the contract is established by competent evidence, free from doubt or suspicion, clear and definite in terms, and upon a valuable consideration. (Ill.) *Casstevens v. Casstevens*, 291.

Note.

Specific Performance of optional contracts for the sale of real property, 592-601.

STATES.

STATE RIGHTS.—One State cannot Expropriate for its public purposes property within the territory of another state. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. STATUTES—Passage—Entries on Legislative Journal.—An entry on a legislative journal that "The bill passed its third reading. Ayes 34, noes —, as follows," followed by a list of those voting in the affirmative, with no further reference being made to those voting in the negative, shows that the bill was passed by a unanimous vote, and that there were no names to be recorded in the negative, and complies with a constitutional requirement that the ayes and noes shall be entered on the journal. (N. C.) *Commissioners v. Trust Co.*, 791.

2. VOID STATUTE—Effect of Incorporating in Revised Statutes. A statute which has been pronounced unconstitutional is not given any force or validity by subsequently being incorporated in the Revised Statutes by a committee appointed to compile and publish the statutes of the state. (Mo.) *Brannock v. St. Louis etc. Co.*, 695.

3. STATUTES—Determination of Their Existence by Court.—When the existence of a statute is in question, the court is not confined in its investigation to the published statutes, but may examine the original rolls in the office of the Secretary of State, though they are not produced in evidence. Nor is it necessary to plead or make proof of the statute, because courts are required to take judicial notice of it. (Mo.) *Brannock v. St. Louis etc. Co.*, 695.

4. CONSTITUTIONAL LAW—Title of Statutes—Amendments.—If what is introduced by way of amendment to a statute might have been incorporated in the statute under its original title, the statute as amended does not embrace more than one subject, and that is expressed in its title. (Mich.) *Pratt Food Co. v. Bird*, 601.

5. CONSTITUTIONAL LAW—Title of Statute.—An amendatory provision in a statute, fixing a standard of pure food and providing means to prevent deception in the sale of such food is within the original title of an act to provide for the appointment of a dairy and food commissioner, and to define his powers and duties and fix his compensation. (Mich.) *Pratt Food Co. v. Bird*, 601.

STOCK AND STOCKHOLDERS.

See Corporations.

STOCKYARDS.

See Constitutional Law, 12, 13.

STREET RAILWAYS.*Duty to Persons in Street.*

1. STREET RAILWAYS—Contributory Negligence.—If a person enters upon a street and drives therein along the track of a street railway company without afterward looking back, or drives along the street until he comes to an obstruction and then turns out upon such track, to avoid the obstruction, without looking back, and the vehicle in which he is riding is struck behind by a car, he is guilty of contributory negligence and cannot recover. (Ohio St.) *Drown v. Northern Ohio Traction Co.*, 844.

2. NEGLIGENCE, CONTRIBUTORY, Right to have Specific Instructions upon.—Where the issue is presented of whether a person injured by a collision with a street-car was not guilty of contributory

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negligence in driving along the track or turning across it without looking back to see whether any car was approaching, it is not sufficient to instruct the jury that if the motorman could, by the exercise of ordinary care, have seen the team and stopped the car, and that by reason of the failure to do so, the team was injured, plaintiff was entitled to recover, if his driver was free from contributory negligence. The defendant has the right to have the jury more specifically instructed, that if the jury find that both plaintiff and defendant, through their agents, were negligent, and the negligence of both contributed so as to directly cause the injury, the verdict should be for the defendant. (Ohio St.) *Drown v. Northern Ohio Traction Co.*, 844.

Street and Interurban Railways.

3. **STREET RAILWAY.**—The Fundamental Purpose of a street railway is to accommodate street travel, and not travel to or from points beyond the limits of the city. (Ill.) *Aurora v. Elgin etc. Traction Co.*, 284.

4. **STREET RAILWAY**—Construction of Franchise.—An ordinance granting the privilege to a street railway company to lay its tracks and operate its cars in the city is strictly construed in favor of the public and against the licensee. Nothing passes by mere implication against the public, and that which is not unequivocally granted is withheld. (Ill.) *Aurora v. Elgin etc. Traction Co.*, 284.

5. **STREET RAILWAY**—Contract to Transport Cars of Interurban Company.—A street railway company, having authority to operate cars and transport passengers in the streets of the city only, cannot confer its privileges upon an interurban railroad which has no authority to enter the city, by contracting with the interurban corporation to transport its cars with their passengers, express and freight through the city streets. (Ill.) *Aurora v. Elgin etc. Traction Co.*, 284.

6. **INTERURBAN RAILROAD**—Right to Enter City.—Where a corporation chartered to operate an interurban railroad desires to enter a city and propel cars along its streets for the transportation of freight or passengers, it must obtain a license to do so from the city, subject to such reasonable rules and regulations as the municipality may find necessary or proper to establish. (Ill.) *Aurora v. Elgin etc. Traction Co.*, 284.

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SUBROGATION.

1. SUBROGATION—Payment of Mortgage—Notice of Judgment Lien.—A purchaser of land with knowledge that three mortgages and two judgments are then subsisting liens thereon, who assumes and agrees to pay the mortgage debts, but ignores the judgment liens, is not entitled, having paid one mortgage, to be substituted to the position of the holder of the mortgage paid, and to have that mortgage considered unpaid when an attempt is made to sell the land on execution to satisfy the judgments. (Kan.) *Kuhn v. National Bank*, 332.

2. SUBROGATION—Purchaser—Payment of Liens.—An independent purchaser of land encumbered with liens, who has no interest to protect therein, and no other equitable claim, cannot assume the payment and pay such lien or liens as he may choose, and claim subrogation as against all inferior liens. (Kan.) *Kuhn v. National Bank*, 332.

Note.

Subrogation. See Insurance of Mortgaged Premises.

SUCCESSION TAX.

See Taxation, 4.

TAXATION.

1. TAXATION—Situs of Property.—The property of a corporation engaged in maritime commerce or navigation is taxable at the place where its general business office is located, and not at the place named in its articles of incorporation as the location of its general office for business. when it has no property at the latter place. (Mich.) *Township of Portsmouth v. Cranage Steamship Co.*, 578.

2. TAXATION—Estoppel.—The act of a navigation company, in listing its property for taxation in a township in which it is not legally taxable does not estop it from contesting the validity of the tax, when everybody concerned acted upon the erroneous assumption that a statute which had already been declared unconstitutional was constitutional. (Mich.) *Township of Portsmouth v. Cranage Steamship Co.*, 578.

3. TAXATION—Estoppel to Contest.—A corporation is not estopped to contest the validity of a tax on its property, on the ground that it failed to appear before the board of review and contest the assessment. (Mich.) *Township of Portsmouth v. Cranage Steamship Co.*, 578.

4. SUCCESSION TAX—Nonresident Mortgagee.—A debt secured by mortgage on real estate situated in Michigan is subject to the succession tax of that state, although the mortgagee was a resident of New Jersey and up to the time of his death had the note and mortgage in his possession there. (Mich.) *In re Merriam's Estate*, 561.

TELEGRAPHS AND TELEPHONES.

1. TELEGRAPH COMPANIES—Delay in Delivery of Message—Recovery for Mental Anguish.—If there is nothing on the face of a telegram to reasonably charge the telegraph company with the knowledge that the plaintiff was the real beneficiary, and that his son, who signed the message, was acting as his agent, and nothing to charge the company with notice that plaintiff might suffer mental anguish if the telegram was unreasonably delayed, he cannot recover therefor. (N. C.) *Helms v. Western Union Tel. Co.*, 811.

2. TELEGRAPH COMPANIES—Delay in Delivery of Message—Damages for Mental Anguish.—One who is not mentioned in a telegraphic message, and whose interest therein is not communicated to the telegraph company, cannot recover substantial damages for mental anguish arising from negligent delay in delivering, or failure to deliver, the message. (N. C.) *Helms v. Western Union Tel. Co.*, 811.

3. TELEGRAPH COMPANIES—Delay in Delivery of Message—Measure of Damages.—If a message is sent for the benefit and at the instance of one whose name does not appear on its face, and the telegraph company is not informed of the nature of the transaction to which the message relates, nor of the position which the plaintiff would probably occupy, the measure of damages for negligent delay in the delivery of the message is the sum paid for sending it, and there can be no recovery for mental anguish. (N. C.) *Helms v. Western Union Tel. Co.*, 811.

4. TELEGRAPH COMPANIES—Delay in Delivery of Telegram—Presumption of Negligence.—If a telegram is not delivered until one week after it is sent, the law presumes negligence on the part of the telegraph company, but such presumption is rebuttable. (N. C.) *Shepard v. Western Union Tel. Co.*, 796.

5. TELEGRAPH COMPANIES—Delay in Delivery—Burden of Proof.—In an action to recover for negligent delay in the delivery of a telegram, the burden as to the negligence is upon the plaintiff; and after all the evidence, direct and in rebuttal, is in, it is still the duty of the plaintiff to satisfy the jury by a preponderance of the evidence that the defendant was guilty of negligence. (N. C.) *Shepard v. Western Union Tel. Co.*, 796.

6. TELEGRAPH COMPANIES—Delay in Delivery of Telegram. In an action to recover for mental anguish caused by negligent delay in the delivery of a telegram, an instruction on the issue of damages that the jury had "a right to take into consideration their own feelings" is erroneous. The jury has only a right to give the plaintiff recompense for the anguish he has suffered from the negligence of the defendant, to be determined, not by their own feelings, but by the evidence. (N. C.) *Shepard v. Western Union Tel. Co.*, 796.

7. TELEGRAPH COMPANIES—Delay in Delivery of Telegram—Evidence of Mental Anguish.—In an action to recover for mental anguish, caused by the negligent delay in the delivery of a telegram, the plaintiff is competent to testify that he was greatly grieved, and that it almost killed him, because of such delay he could not

be at his father's deathbed and funeral. (N. C.) *Shepard v. Western Union Tel. Co.*, 796.

8. **EVIDENCE—Mental Anguish.**—If close relationship exists, mental anguish caused by death is presumed, but this does not exclude more direct proof by the plaintiff's own testimony. (N. C.) *Shepard v. Western Union Tel. Co.*, 796.

See Evidence.

TENANCY IN COMMON.

COTENANCY IN MINES—Unauthorized Expenditures—Contribution.—One co-owner in a mine, without the consent of the other co-owners, who have not joined with him, or in some way given their consent to the development or prospecting of such mine, cannot demand from such co-owners contribution or remuneration for expenses incurred in prospecting or developing the common property. He must get contribution, if at all, from the profits realized from the property. (Colo.) *Stickley v. Mulrooney*, 107.

TIMBER.

See Deeds, 13-18.

TITLE OF STATUTE.

See Statutes, 4, 5.

TORTS.

1. **JOINT TORT-FEASORS, Who are.**—If two persons procure the illegal imprisonment of another, with and by third persons, the latter and the former are joint tort-feasors, and a release of the one from liability for the unlawful imprisonment releases all. (Conn.) *Allen v. Ruland*, 146.

2. **TORTS—Joint Tort-feasors.**—The fact that several execution and attachment creditors gave to a sheriff separate and independent indemnifying bonds does not tend to prove, in a joint action against them for trover and conversion, that by thus ratifying the acts of the sheriff each defendant thereby made itself a joint tort-feasor with the other defendants. (Colo.) *Livesay v. First Nat. Bank*, 120.

3. **PLEADING—Joint Liability.**—The mere fact of joining in a joint answer by defendants who are charged with joint liability has no weight as evidence to prove such joint liability, in the absence of other acts which tend to prove such joint liability. (Colo.) *Livesay v. First Nat. Bank*, 120.

4. **TORTS—Joint Tort-feasors—Joint Liability—Directing Verdict.** A failure to prove the joint liability of all the defendants, in an action against them as joint tort-feasors, is a failure to prove the cause of action alleged, and in such case the proof of several separate and distinct trespasses only is fatal to the cause of action, and warrants the court in directing a verdict for the defendants. (Colo.) *Livesay v. First Nat. Bank*, 120.

5. **TORTS—Joint Tort-feasors—Liability.**—Persons who act severally and independently, each causing a separate and distinct injury, cannot be sued jointly, as joint tort-feasors, even though the injuries may have been precisely similar in character, and inflicted at the same time. A joint tort is essential to the maintenance of a joint action. (Colo.) *Livesay v. First Nat. Bank*, 120.

See Release.

TRADE UNIONS.

1. **A LABOR UNION has No Right to Inflict a Penalty upon, or to Assess Damages Against, One Who Owes It No Duty** through association in the membership in the union or by contract or otherwise, nor to overawe him into the payment of something by means of threats of injury in its power to inflict and of such a character as to naturally arouse a reasonable apprehension of serious consequences to him in the event of his refusal. (Conn.) *March v. Bricklayers' etc.* Union No. 1, 127.

2. **A LABOR UNION is Guilty of Extortion** in fining a manufacturer of brick for selling his product to a boss mason, who employs nonunion men, and then threatening such manufacturer and another boss mason to whom he has sold other brick, that if the fine is not paid, the union will withdraw all its men from the job, and will forbid its men to handle any of the manufacturer's brick, unless the fine is first paid, and he, having yielded to this pressure, and paid the fine, may recover of the union the sum so paid. (Conn.) *March v. Bricklayers' etc.* Union No. 1, 127.

3. **EXTORTION by a Labor Union by Threat of a Lawful Act.**—That the threat by which a labor union obtains money is to do an act which it may lawfully do does not always relieve its action, when it obtains money thereby, from the stigma of extortion. (Conn.) *March v. Bricklayers' etc.* Union No. 1, 127.

4. **LABOR UNION and Its Agents, Joint Liability of, for Causing Loss of Employment.**—Under an allegation of conspiracy between a labor union and its business delegate in causing the discharge of the plaintiff from his employment by threatening and intimidating his employer, and of malice on the part of the defendants, it is not necessary to prove either the conspiracy or the malice, if there is sufficient evidence to show that what the defendants did caused the discharge by the plaintiff by means of threats and intimidation. (Conn.) *Wyeman v. Dedy*, 152.

5. **LABOR UNION and Its Business Agent or Walking Delegate, Evidence to Sustain Joint Recovery Against.**—If the evidence tends to show, in an action against a labor union and its walking delegate, that he procured the discharge of the plaintiff from his employment, and that his acts were with the knowledge and approval of the union and also by its authority, a joint recovery against both may be sustained. (Conn.) *Wyeman v. Dedy*, 152.

6. **LABOR UNION, Damages Against, for Causing Discharge of the Plaintiff are not Restricted to Wages Lost by Him.**—In an action against a labor union and its walking delegate for procuring the discharge of the plaintiff by threatening and intimidating his employer, his damages are not restricted to the amount of wages lost by him prior to the commencement of the action. The jury may award punitive damages, or may find, if so alleged, that he was otherwise injured in his business than by loss of employment. (Conn.) *Wyeman v. Dedy*, 152.

7. **TRADE UNIONS—Unlawful Expulsion—Damages.**—If the suspension of a member from a trade union and the consequent withdrawal of his membership card are not warranted by the laws of the association, because the tribunal that tried him acted without jurisdiction and without his consent as required, and such act results in the loss to him of his employment and resulting actual damage, he is entitled to recover therefor from such association. (N. J. L.) *Brennan v. United Hatters of N. A., Local No. 17*, 727.

8. MALICE IN LAW Means nothing more than the intentional doing of a wrongful act without justification or excuse, and a wrongful act in this connection is any act which will in the ordinary course infringe upon the rights of another, to his damage, except it is done in the exercise of an equal or superior right. (N. J. L.) *Brennan v. United Hatters of N. A., Local No. 17*, 727.

See Master and Servant, 1, 2.

TRAILING BY DOGS.

See Criminal Law, 11.

TRIAL.

Instructions.

1. JURY TRIAL—Instructions.—An Instruction may be Refused if It is but a Repetition of what has already been expressed in other instructions. (Conn.) *Barker v. Lewis Storage etc. Co.*, 141.

2. JURY TRIAL—Instructions, When do not Prejudicially Refer to the Facts.—That an instruction in an action for personal injuries was given on the theory that the plaintiff had suffered injury did not prejudice the defendant if there was no dispute on that question. (Idaho) *Eaton v. City of Weiser*, 225.

Directing Verdict.

3. TRIAL—Directing Verdict.—The Rule that When an Unimpeached Witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to can be drawn, the fact may be taken as established and a verdict directed on the evidence, does not apply where the witness is interested in the result of the suit, or facts are shown which may bias his judgment, or from which an inference may be drawn unfavorable to or against the facts testified to by him. (Ark.) *Skillern v. Baker*, 52.

4. TRIAL—Directing Verdict, When Improper.—When a defendant testifies positively that he served a notice on the plaintiff's agent, it is improper for the court to assume such fact as proved and direct a verdict accordingly, if the agent testifies that he has no recollection of its service. (Ark.) *Skillern v. Baker*, 52.

See Criminal Law.

TROVER AND CONVERSION.

1. TROVER AND CONVERSION—Pleading.—If a complaint for trover and conversion alleges that the defendants wrongfully took the chattels described from plaintiffs and converted them to their own use, an answer denying that the defendants, or any of them, took such chattels when in the possession of plaintiffs, or in any manner as set up in the complaint, and further alleging separate levies in favor of each of the defendants, does not admit a joint taking. (Colo.) *Livesay v. First Nat. Bank*, 120.

2. TROVER.—A Present Right of Possession at the Time of Conversion is Sufficient to support an action of trover. (Conn.) *Barker v. Lewis Storage etc. Co.*, 141.

3. DAMAGES—Conversion of Books.—The Measure of Damages for the conversion of books owned and held for personal use is the same as that of any other class of household effects so kept and held. (Colo.) *Livesay v. First Nat. Bank*, 120.

TRUSTS.

1. **TRUSTEE, When Authorized to Convert Stock into Cash for Distribution as Income.**—If a trustee under the duty of distributing as income cash dividends receives such dividend in the form of capital stock, he is authorized by sale to convert it into cash to enable him to make the required distribution. (Conn.) *Green v. Bissell*, 156.

2. **TRUSTS—Power to Sell and Reinvest—Right to Mortgage.**—If a trustee is authorized to sell and dispose of the trust property and reinvest the proceeds, he can execute a valid mortgage for the purchase money of property purchased, or any part thereof. (Md.) *Stump v. Warfield*, 434.

3. **TRUSTS—Power to Sell—Right to Mortgage.**—Power in a trustee to grant and convey absolutely does not authorize him to mortgage the trust property. (Md.) *Stump v. Warfield*, 434.

4. **TRUSTS—Power of Sale—Limitation.**—If a feme covert is given only an equitable life estate with power of disposition of the property absolutely for a purpose clearly defined, the limitation operates as a negation of any other purpose. (Md.) *Stump v. Warfield*, 434.

5. **TRUSTS—Power of Sale—Right to Mortgage.**—A trustee or life tenant with power of sale absolutely is not authorized to mortgage the trust property to secure money loaned for the purpose of paying taxes, interest due on a purchase money mortgage and other expenses connected with the trust property, and such mortgage affects only the interest of the life tenant and not that of the remaindermen. (Md.) *Stump v. Warfield*, 434.

6. **TRUSTS—Power to Sell—Right to Mortgage.**—If a donee of a power to sell land also has an interest in his own right, a conveyance or mortgage of the land by him, not appearing expressly or impliedly to be made in the execution of the power, passes his interest only. (Md.) *Stump v. Warfield*, 434.

7. **TRUSTS—Power to Sell—Right to Mortgage—Rights of Remaindermen.**—If a trustee or life tenant, with power of absolute sale, executes a mortgage on the trust property which is not a valid execution of the power, and conveys only the interest of the life tenant, without binding the interest of the remaindermen, they are entitled to recover the property by action in ejectment against the purchaser under the mortgage foreclosure, and in possession after the death of the life tenant. (Md.) *Stump v. Warfield*, 434.

8. **TRUST PROPERTY—Right of Beneficiaries to Deal with.**—Beneficiaries of trust property who are sui juris and whose rights are vested may deal with and convey their equitable interests in the trust property, and the trustee will be required to convey the legal title in accordance therewith if such action is not contrary to the terms of the trust. (Wis.) *McKeigue v. Chicago etc. Ry. Co.*, 1038.

See Life Tenants.

VENDOR AND VENDEE.

1. **VENDOR AND PURCHASER—Notice of Existing Liens.**—A purchaser of land, in the absence of fraud, takes the title thereto subject to all liens which are properly of record, and also subject to all other liens of which he has actual notice. (Kan.) *Kuhn v. National Bank*, 332.

2. VENDOR AND VENDEE—Transfer by Operation of Law—Doctrine of Relation.—In case of a transfer of title by mere operation of law upon the acts of the parties, the change of title occurs at the instant all the circumstances exist requisite thereto, but no earlier, except in so far as the operation of the doctrine of relation may be necessary to protect the vendee and those in privity with him. (Wis.) *Evans v. Crawford County etc. Ins. Co.*, 1009.

3. VENDOR AND VENDEE.—The Doctrine of Relation carries a transfer of real estate back to the date of the executory agreement therefor, so far as necessary to protect the equitable rights of the vendee; but strangers to the transaction cannot invoke the doctrine. (Wis.) *Evans v. Crawford County etc. Ins. Co.*, 1009.

4. VENDOR AND PURCHASER—Option to Purchase—Validity. An option for the purchase of land is not unconscionable, although it gives the purchaser the right to purchase or not at his option, with a choice of remedy by suit for specific performance or action for damages, but limits the vendor in case of failure to purchase to nominal stipulated damages. (Mich.) *Mier v. Hadden*, 586.

5. OPTION TO PURCHASE LAND—Renunciation.—If a valuable consideration is paid for an option to purchase land, the vendor cannot withdraw the offer during the stipulated period of the option. (Mich.) *Mier v. Haddon*, 586.

See Deeds; Frauds, Statute of.

VERDICT.

See Trial, 4, 5.

WAREHOUSEMEN.

1. WAREHOUSEMEN, Joint Liability of to Joint Bailors.—If a warehouseman admits that in his capacity as such he received property from two persons as joint bailors, this involves the admission of their right to a joint recovery upon proof of a conversion. (Conn.) *Barker v. Lewis Storage etc. Co.*, 141.

2. WAREHOUSEMEN, Care Required of.—The Care Required of a Warehouseman is not Measured by the Care Usually Employed by Other Warehousemen in the vicinity, in keeping like property. (Conn.) *Barker v. Lewis Storage etc. Co.*, 141.

WATERS AND WATERCOURSES.

Legislative Control of Waters.

1. WATER AND WATERCOURSES—Control of by State.—If the state owns the bed of the stream where flowed by the tide, save so far as it may have made grants to private owners, it has a proprietary right to the continued flow of the stream which is paramount to the rights of the upper riparian owners to withdraw water for purposes other than those incident to riparian ownership. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

2. CONSTITUTIONAL LAW—Control of Water in Streams.—The law-making power may determine whether the amount of water proposed to be abstracted from a stream for other than riparian uses is so slight that it ought to be disregarded, and it is also within the competency of the legislature to determine that the diversion shall be absolutely prohibited. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

Riparian Rights.

3. **WATERS, Riparian Rights from Custom or Usage not Amounting to Prescription.**—In the maintenance of prescriptive rights there is no right, as between riparian proprietors, in the waters of a stream, founded upon custom or usage. (Mass.) *Mason v. Whitney*, 488.

4. **WATERS, Riparian Proprietors' Rights in.**—In determining what is reasonable for each of the parties, the nature of the stream and of the several mill privileges, its adaptability to different modes of use, the wants of the community, the custom or usage of the people in the neighborhood and elsewhere in regard to the management of the business, the hours of labor, and the use of the water of such stream, are all proper matters for consideration as evidence. (Mass.) *Mason v. Whitney*, 488.

5. **WATERS, Reservoirs and Dams, Proprietors not Owning Have No Right to the Benefit of.**—If the plaintiffs have enjoyed for their wheels gratuitously the benefit of the defendant's dam and reservoir for the storage of water and for their wheels, that is not a circumstance which gives them a right to have it in like manner in the future, or which deprives him of the right to use the stream now as he could do if his works on the stream were all new. Nor does it make it less reasonable for him to use the water now according to his interest. (Mass.) *Mason v. Whitney*, 488.

6. **WATERS.—The Joint Use of the Waters of a Stream by Several Riparian Proprietors** does not enlarge their rights, in a suit brought by them against a lower riparian proprietor. The question as to each is, whether the defendant is using the water unreasonably to his detriment. (Mass.) *Mason v. Whitney*, 488.

7. **WATERS, Rights of Riparian Proprietors.**—The primary right of every riparian proprietor is to have the natural and customary flow of the stream without obstruction or change. This right is modified by the right of every proprietor to make any reasonable use of the water which leaves the lower proprietor the natural flow, changed, so far as may be, by such previous use of the stream above. If such use makes the flow more advantageous for the lower proprietor than the flow in its strictly natural state, he gets the benefit of it, as an incident to his ownership, which he may enjoy while it lasts, but not as permanent property which he can control for the future. (Mass.) *Mason v. Whitney*, 488.

8. **WATERS—Night-time, Riparian Owners' Right to Use in.**—It is not unreasonable for a mill owner, if his interests require it, to use the waters of a stream at night as well as by day, so long as he leaves the natural flow of the stream unobstructed and undiminished during the ordinary working hours of the day. (Mass.) *Mason v. Whitney*, 488.

9. **WATERS.—A Riparian Owner Maintaining a Reservoir cannot be Compelled to Allow More Water to Run During the Working Hours** than if no reservoir were maintained. If an upper proprietor maintains for his own purpose a reservoir for the storage of water that fails in the wet season, to be let down into the stream in times of low water, and in such time increases the flow by letting down water, the additional quantity that so comes each day may be treated as part of the natural flow for the twenty-four hours in determining the rights of the lower mill owners in reference to the use of their mills farther down the stream, but the mill owner is not under any obligation, against his own interest, to hold back water in the night-time in order to enable his neighbor to use it more profitably the

next day. The lower proprietor is entitled only to a natural flow, and not to an intermittent flow. (Mass.) *Mason v. Whitney*, 488.

Right to Transport Water Beyond the State.

10. **WATER AND WATERCOURSES—Right to Transport Water Beyond the State.**—A corporation lawfully formed for the purpose of damming rivers and streams, and storing, transporting, and selling water, has no power under the statutes of New Jersey to deplete the streams of the state for the purpose of conveying the water beyond the borders of the state. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

11. **WATER AND WATER RIGHTS—Commerce in Water—State Policy.**—So far from sanctioning any general commerce in water and streams of the state, the legislative policy of New Jersey has been, and still is, to preserve and administer her water rights for the benefit of the people of the state to whom, by right of proximity and sovereignty, the waters naturally belong. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

12. **WATER AND WATER RIGHTS.**—One state or the citizens thereof have no inherent right to withdraw a supply of water from the territory of another state by artificial means. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

13. **CONSTITUTIONAL LAW—Preservation of Water of State.**—The state by statute may prohibit the abstraction from the lakes, ponds and streams of the state of waters to be used for any other purpose than to meet the lawful uses of riparian owners and vested rights under grants already made, and when a statute has forbidden its abstraction for a stated purpose, not within such uses, abstraction for that purpose becomes unlawful, and may be restrained at the suit of the attorney general. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

14. **CONSTITUTIONAL LAW—Transportation of Water Out of the State.**—A statute prohibiting any person or corporation from transporting, through pipes, conduits or other means, the waters of any fresh-water lake, pond or stream of the state into any other state is constitutional. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

15. **WATER AND WATERCOURSES—Transportation Beyond State—Interstate Commerce.**—A statute prohibiting the abstraction of water from the fresh-water streams of the state for transportation beyond its borders is not in violation of the interstate commerce clause of the national constitution. Water unlawfully diverted cannot legitimately enter into interstate commerce. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

Forfeiture of Water Rights.

16. **WATER RIGHTS—Forfeiture—Reappropriation.**—If, after execution sale of land, the owner, being entitled to a water right separate from the land, an irrigation company furnishes the execution purchaser of the land with water during the three succeeding years, without any application for the water during such years by the former owner, this does not work a forfeiture of his water right and a reappropriation thereof by the execution purchaser of the land. (Colo.) *Cooper v. Shannon*, 95.

17. **WATER RIGHTS—Forfeiture.**—Although the by-laws of a water company require application for water to be made in writing each year, and provide "that any person entitled to purchase prior

water for use upon land entitled thereto, who shall for two successive years fail to pay for water for such land, shall be deemed to have forfeited his right thereto," yet, in the absence of any affirmative action by the company by which the owner of the right was duly notified, such by-laws cannot have the effect of vesting title to the water right in such company, or in another, provided such company delivers the same amount of water to such other. (Colo.) *Cooper v. Shannon*, 95.

18. WATER RIGHTS—Abandonment—Findings—Appeal.—Abandonment of a water right is a matter of intention, and it is peculiarly within the province of the trial court to determine from all the facts and circumstances of each particular case, whether abandonment has or has not taken place, and a finding of the court upon this question, based upon sufficient evidence, will not be disturbed on appeal. (Colo.) *Cooper v. Shannon*, 95.

Sale of Waters or Water Rights.

19. WATER AND WATERCOURSES—Right to Divert for Sale. A riparian owner has no right, as such, to divert water from the stream to make merchandise of and sell it, nor has he any right to transport any portion of the water from the stream to a distance for the use of others than riparian owners. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

20. WATER AND WATERCOURSES—Right to Divert for Sale.—A riparian owner, as such, has no common-law right to make merchandise of the water that otherwise would naturally flow to the sea, and the state of New Jersey has not, by legislation or otherwise, departed from the common-law rule. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

21. WATER AND WATERCOURSES—Right to Divert for Sale—Public Use.—If any grant of the power of eminent domain is by the constitution limited to public uses, the withdrawal of water from a stream to make merchandise of it cannot be deemed a public use. (N. J. Eq.) *McCarter v. Hudson County Water Co.*, 754.

22. WATER RIGHTS—Sale and Transfer of.—Although a water right may be appurtenant to the land, it is the subject of property, and may be transferred either with or without the land, and whether the deed conveys the water right depends upon the intention of the grantor to be gathered from the express terms of the deed, or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident and necessary to the beneficial enjoyment of the land. (Colo.) *Cooper v. Shannon*, 95.

23. WATER RIGHTS—Conveyance—Sheriff's Deed.—The right to have water delivered at a stipulated price is a valuable right and when the sheriff's deed to the land to which it is appurtenant does not purport to convey such right, there must be some intention to so convey found in the circumstances attending the conveyance before the right will pass under the deed. (Colo.) *Cooper v. Shannon*, 95.

24. WATER RIGHTS—Ditch Companies—Sheriff's Deed.—A statute requiring ditch companies to furnish water whenever they have water in a ditch unsold, and providing that persons having purchased and used water shall have the right to continue to purchase such water, does not apply to proceedings between individuals only, and when the question to be determined is simply whether a sheriff's deed includes and conveys a water right. (Colo.) *Cooper v. Shannon*, 95.

Quieting Title to Water Rights.

25. WATER RIGHT—Action to Quiet Title—Issues.—In an action by a purchaser at a sheriff's sale to quiet title to a water right alleged to be appurtenant to the land, the question whether the defendant has more water than is actually needed, or not enough for the irrigation of his land, is entirely immaterial. (Colo.) *Cooper v. Shannon*, 95.

26. WATER RIGHTS—Action to Quiet Title.—In an action by a purchaser at sheriff's sale to quiet title to a water right alleged to be appurtenant to the land, the question as to whether the defendant is entitled to hold a water right for the reason that he is a mere tenant at will cannot be raised by the plaintiff. (Colo.) *Cooper v. Shannon*, 95.

See Navigable Waters.

WILLS.*Testamentary Capacity.*

1. TESTAMENTARY CAPACITY—Letter as Evidence of Delusion.—A letter written by a testator to his sister a few months prior to the execution of his will, disclosing his belief that all women were attempting to poison him, and that she is one of the "murderers," is admissible in evidence to show that he was suffering from an insane delusion, without extrinsic proof as to where it was written or as to whether it was sent to the addressee. (Ill.) *Dowie v. Sutton*, 266.

2. TESTAMENTARY CAPACITY.—An Instruction to the Jury that to make a valid will the testator must be capable of knowing what his property is, who are the natural objects of his bounty, and be able to understand the nature, consequence and effect of his act; and that "all of these elements must concur, and the absence of any one of them will render such person incompetent to make a will," does not require him to be able to hold all such elements in his mind at the same time, and is therefore not improper. (Ill.) *Dowie v. Sutton*, 266.

3. TESTAMENTARY CAPACITY—Undue Influence.—An instruction to the jury that if a testator, when executing his will, was "so far under the dominion of any person as to prevent the free exercise of his judgment," he was not of disposing mind and memory, is not erroneous in failing to qualify "dominion" by "wrongful." (Ill.) *Dowie v. Sutton*, 266.

4. TESTAMENTARY CAPACITY.—Undue Influence or dominion is such influence as deprives the testator of his free agency or volition. (Ill.) *Dowie v. Sutton*, 266.

5. TESTAMENTARY CAPACITY.—One may have Capacity to attend to the ordinary business affairs of life and yet be without capacity to make a will, if he is insane with reference to the subjects connected with the testamentary disposition of his property and the natural objects of his bounty. (Ill.) *Dowie v. Sutton*, 266.

6. TESTAMENTARY CAPACITY—Evidence of Surrounding Facts.—When want of testamentary capacity, undue influence, or fraud is charged, all the surrounding facts, including the will itself, its propriety or impropriety, its reasonableness or unreasonableness, in view of the situation, relations and circumstances of the testator, may be considered as bearing upon the issues raised. (Ill.) *Dowie v. Sutton*, 266.

Construction of Will.

7. **WILLS, Construction of by the Aid of Subsequent Decisions.**—Though the law upon a subject involving the construction of words employed in a will is not judicially determined in the state until after its execution, the declaration when made does not create the law, but merely declares the law previously existing, and the will must be read, interpreted and given effect pursuant to the law so declared. (Conn.) Boardman v. Mansfield, 178.

8. **WILLS—Testator, When Presumed to Employ Language in the Legal Sense of the Terms Used.**—Though the meaning of the phraseology of a will respecting certain terms therein has not been judicially established in the state where the will was executed, yet if it has been established by decisions in other states, the testator, if he is a lawyer by profession, though a business man by practice, will be presumed to have used such terms with the purpose of accomplishing results judicially upheld by such decisions in the other states. (Conn.) Boardman v. Mansfield, 178.

9. **WILLS—Latent Ambiguity—Parol Evidence to Explain.**—If a testatrix bequeaths to a legatee a certain amount of stock in a bank which she designates in her will as the "Second National Bank of Mercer," and there is no such bank in the town of Mercer, there arises a latent ambiguity in the will, and evidence dehors it is properly admitted to show what stock was the subject of the bequest. (Pa.) Snyder's Estate, 900.

10. **WILLS—Devise to Heirs at Law, When Deemed to be per Stirpes.**—Under a devise of the testator's property to his heirs at law to share the same equally, if he leaves a sister and the children of a deceased sister, his estate must be distributed per stirpes, viz., one-half to the sister and the other half equally among the children of the deceased sister. (Mass.) Allen v. Boardman, 497.

Legacies.

11. **WILLS—Specific Legacies.**—A specific legacy or devise is a gift by will of a specific article or part of the testator's estate, identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing. (Pa.) Snyder's Estate, 900.

12. **WILLS—Legacies.**—The Law Leans Against Specific in favor of general legacies. (Pa.) Snyder's Estate, 900.

13. **WILLS—Legacies—General or Specific.**—A bequest, in general terms, of a certain amount of stock, without identifying any particular shares or distinguishing those given from all others of the same kind, is a general and not a specific legacy. (Pa.) Snyder's Estate, 900.

14. **WILLS—Legacies—Presumption Against Specific.**—A legacy of corporate stock of whatever denomination is not prima facie specific, but is a general legacy, although the testator may have had stock of the description mentioned sufficient to answer the bequest. (Pa.) Snyder's Estate, 900.

15. **WILLS.—General Legacies are Such as are payable out of the general assets of the testator's estate, such as gifts of money or other things in quantity, and not in any way separated or distinguished from other things of like kind.** (Colo.) Nusly v. Curtis, 113.

16. **WILLS.—Specific Legacies are gifts by will of specific articles, or particular parts of the testator's estate, which are identified and distinguished from all others of the same nature, and which are to**

be satisfied only by the delivery and receipt of the particular things given. (Colo.) *Nusly v. Curtis*, 113.

17. **WILLS—Demonstrative Legacies.**—A demonstrative legacy partakes of the nature of both a general and specific legacy, and is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. (Colo.) *Nusly v. Curtis*, 113.

18. **WILLS—Legacies—Interpretation of.**—Courts are not inclined to favor specific legacies, and if compatible with the language employed, are disposed to interpret legacies as general or demonstrative; but if the language is clear, and plainly evinces an intent to create a specific legacy, such effect must be given to the language used. (Colo.) *Nusly v. Curtis*, 113.

19. **WILLS—Legacies—Interpretation of.**—In ascertaining the nature of a legacy, the question is one of intent, to be gathered from the language used in creating it, in the light of the circumstances of the testator and the property he is disposing of in his will. (Colo.) *Nusly v. Curtis*, 113.

Ademption of Legacy.

20. **WILLS—Specific Legacies—Ademption.**—If a testatrix by her will gives to five specified legatees the entire proceeds of an insurance policy on her husband's life, provided the money is actually received and collected by her executors, and she afterward collects the entire fund during her lifetime, and mingles it with her property generally, so that no part of it is traceable into her executor's hands, such legacies are specific, and by her act became adeemed. (Colo.) *Nusly v. Curtis*, 113.

21. **WILLS—Legacies—Ademption.**—A specific bequest is subject to ademption, but not so a general or a demonstrative legacy. (Colo.) *Nusly v. Curtis*, 113.

Revocation.

22. **WILLS, Revocation of.**—No Act of Tearing or Cancellation Destroys a Will, Unless it is done with the intention of revoking it. The intent to revoke may be absolute and final, or dependent on the existence, or the belief in the existence, of certain circumstances. (Conn.) *Strong's Appeal*, 138.

23. **WILLS, Revocation of, Through Mistake, Effect of.**—A writing purporting to revoke a will on account of the existence of a certain fact does not revoke it, if there is no such fact. It is not material whether the mistake is one of fact or of law. (Conn.) *Strong's Appeal*, 138.

24. **WILLS, Revocation of, in the Mistaken Belief that Another Will has Become Effective.**—Though the testator tears his will and writes thereon "superseded by a written one," when in fact the written will has not been so executed as to become effective, the first will is not thereby revoked, especially when the old and the supposed new will are found in the same envelope, and it is evident that whatever the testator did constituted one transaction proceeding from the same intent and actuated by the same cause. (Conn.) *Strong's Appeal*, 138.

Contest of Will.

25. **WILL CONTEST—Appeal.**—In a Proceeding in Chancery to contest a will which disposes of real estate or real and personal property, an appeal lies directly to the supreme court; but if the will

disposes of personal property only, the appeal goes from the trial court to the appellate court, for the reason that a freehold is not involved. (Ill.) *Dowie v. Sutton*, 266.

26. WILL CONTEST.—The Verdict of the Jury in will contests in chancery is binding upon the chancellor, having the same force and effect as a verdict at law. It is not advisory merely. (Ill.) *Dowie v. Sutton*, 266.


27. WILL CONTEST.—When an Appeal from a will contest in chancery is taken to the appellate court, the affirmance of the decree by that court has the same effect as a final determination of the facts as the affirmance by it of a judgment at law. (Ill.) *Dowie v. Sutton*, 266.

28. WILL CONTEST—Church not Necessary Party.—Where a bequest for the benefit of a church is made to a certain person and his successors, as overseers of the church, with power to dispose of the estate in furtherance of the object of the bequest, no trust being expressed, the church is not a necessary party to a bill to contest the will. (Ill.) *Dowie v. Sutton*, 266.

29. WILL CONTEST—Costs Against Executor.—The estate of a testator cannot be drawn upon to reimburse the executor in an unsuccessful attempt to uphold the will when attacked by a bill in chancery. (Ill.) *Dowie v. Sutton*, 266.

WITNESSES.

WITNESSES—Mode of Interrogating.—If it is proposed to interrogate a witness without including in the question all the facts upon which he is to give an opinion, the court may decline to permit him to so testify. (Conn.) *Barker v. Lewis Storage etc. Co.*, 141.

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